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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO, CENTRAL JUSTICE CENTER**

FIFTH AVENUE LANDING  
CALIFORNIA, LLC, a California limited  
liability company,

Plaintiff,

v.

SAN DIEGO CONVENTION CENTER  
CORPORATION, a non-profit benefit  
corporation; CITY OF SAN DIEGO, a  
municipality; and, DOES 1 through 20,

Defendants.

Case No.: **37-2017-00037528-CU-BC-CTL**

**UNLIMITED JURISDICTION**

**COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF**

**Jury Trial Demanded**

Plaintiff Fifth Avenue Landing California, LLC ("FAL"), for its complaint against the above-captioned defendants, alleges the following:

**PRELIMINARY STATEMENT**

**PARTIES**

1. Plaintiff FAL is a California limited liability company doing business in the County of San Diego, with its principal place of business at 1311 First Street, Coronado, California.
2. Defendant San Diego Convention Center Corporation (the "Corporation") is a municipal corporation doing business in the County of San Diego, with its principal place of business at 111 West Harbor Drive, San Diego, California. The Corporation is a wholly-owned subsidiary of the City of San Diego.

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SAN DIEGO COUNTY, CA

3. Defendant City of San Diego (the "City") is a municipality with its principal place of business at 202 C Street, San Diego, California.

4. On information and belief, at all times relevant to this Complaint, the City is the alter ego of the Corporation. Plaintiff is informed and believes that there existed, and continues to exist, a unity of interest and ownership between the City and the Corporation such that any separateness has ceased to exist. The City has controlled, dominated, and operated the Corporation as its alter ego. Plaintiff is informed and believes that, at all times relevant to this Complaint, the Corporation was a mere shell, instrumentality, and conduit through which the City operated its plans for a Convention Center expansion, and further, that the City caused assets to be transferred to the Corporation without consideration. Therefore, adherence to the fiction of separate existence of the Corporation as an entity separate and apart from the City would permit an abuse of the corporate privilege, would sanction fraud and promote injustice, and would produce an inequitable result in that Plaintiff could be deprived of full recovery for the City's wrongful acts. Under alter ego principles, the City is liable for all the obligations of the Corporation and any judgment entered against the Corporation in this action.

5. Plaintiff is unaware of the true names and capacities of defendants sued as Does 1 through 20, and therefore sue those defendants by fictitious names. Plaintiff will seek leave to amend to add the true names and capacities of each Doe defendant once they are ascertained.

6. Plaintiff is informed and believes, and thereon alleges, that in doing or failing to do the acts and actions alleged herein, each defendant was the agent or representative of each remaining defendant, and was acting within the course and scope of such agency or representation.

#### **JURISDICTION AND VENUE**

7. Jurisdiction and venue are proper in this court because (a) each of the parties is located or doing business within this jurisdiction; (b) this action concerns an interest in real property located within this jurisdiction; (c) this action concerns contracts entered into, to be performed in, and breached within this jurisdiction, as well as torts committed within this jurisdiction; and (d) damages were caused within this jurisdiction.

///

## **BACKGROUND**

8. This action arises out of a breach of the 2010 Amended, Restated and Combined Lease agreement (the “ARC Lease”) between FAL, the Corporation, and the San Diego Unified Port District (the “Port”). A true and correct copy of the ARC Lease is attached as **Exhibit A**. The ARC Lease concerns leasehold interests and development rights on an approximately five-acre parcel of public tidelands property (the “Property”) located adjacent to the San Diego Convention Center (the “Convention Center”).

### **The Property**



9. The Property consists of public tidelands located at Fifth Avenue and Marina Park Way. The Property is owned by the State of California and managed by the Port as trustee. The Port is governed by seven appointed Commissioners: four are representatives from National City, Coronado, Chula Vista, and Imperial Beach, respectively; three are appointed by the San Diego City Council.

10. In 1984, the Port entered into a 40-year lease of the Property with Sea Group Construction, Inc. (“Sea Group”). In 1987, Sea Group assigned that lease to Ray Carpenter. Four years later, Mr. Carpenter assigned an undivided 50% interest in the lease to California Properties (a

1 general partnership), and in turn Mr. Carpenter and California Properties jointly assigned the entire  
2 lease to FAL.

3 11. From 1991 to 2010, FAL was the lessee of the Property. During most of that time,  
4 the Property was designated for use as a "Contractors Work Basin," from which hundreds of  
5 millions of dollars in marine contracting were let, including the building of the Navy's nuclear  
6 carrier wharfs and the cleanup of the Exxon Valdez oil spill.

7 12. In 2007, the Port and the California Coastal Commission approved the development  
8 of a 23-story building and a 250-room hotel known as the Spinnaker Hotel on the Property. And by  
9 the end of that year, FAL had spent millions of dollars on the Spinnaker's development, which  
10 included clearing the site of office and warehouse buildings, removing railroad rail links to the  
11 Property, and demolishing a 400-foot apron wharf and other industrial remnants to allow for the  
12 transformation to take place.

13 13. In 2008, a complete renovation of the Property began as the newly entitled Spinnaker  
14 Hotel pushed aside the adjacent industrial uses. That same year, however, the Great Recession  
15 devastated San Diego's hotel industry and halted the Spinnaker's development.

16 14. Because the Spinnaker was no longer being constructed, FAL instead built a new  
17 marina and ferry terminal in conjunction with the Property, which cost FAL more than \$7,000,000.

18 15. In 2009, the City and the Corporation determined that the FAL site should be used for  
19 a Convention Center expansion (the "Phase III Expansion"). The proposed Phase III Expansion  
20 immediately generated controversy among the public and the California Coastal Commission  
21 because it was contrary to promises made by the City and the Corporation during the approval  
22 process for the first expansion, including the promise that the Convention Center would not expand  
23 towards San Diego Bay.

24 **The Lease Purchase Transaction:**

25 16. In 2009, in anticipation of the Phase III Expansion, the Corporation—with the active  
26 support of the City—began a year of due diligence, after which it purchased FAL's lease of the  
27 Property pursuant to a Purchase and Sale Agreement dated May 7, 2010 (the "Lease Purchase  
28 Agreement"). A true and correct copy of the Lease Purchase Agreement is attached as **Exhibit B**.

1           17.     The Corporation and FAL also executed an Assignment and Assumption of Lease  
2 Agreement, and the Corporation delivered to FAL a purchase money promissory note ("Purchase  
3 Money Promissory Note"), under which the Corporation agreed to pay FAL \$13,500,000, consisting  
4 of \$1,000,000 in cash payable at closing—with partial interest payments due annually for four  
5 years—and the \$12,500,000 balance and all deferred interest due on the fifth anniversary of the  
6 closing. A true and correct copy of the Assignment and Assumption of Lease Agreement is attached  
7 as **Exhibit C**, and a true and correct copy of the Purchase Money Promissory Note is attached as  
8 **Exhibit D**.

9           18.     In addition to these above agreements, the Corporation, FAL, and the Port entered  
10 into the ARC Lease, under which the Corporation became the lessee of the Property for the  
11 remainder of FAL's lease term, on the condition that the Corporation comply with the payment  
12 terms under the Assignment and Assumption of Lease Agreement, the Lease Purchase Agreement,  
13 and the Purchase Money Promissory Note. The Purchase Money Promissory Note was secured by a  
14 purchase money deed of trust encumbering the Corporation's leasehold interest under the ARC  
15 Lease.

16           **The ARC Lease**

17           19.     Under Paragraph 49 of the ARC Lease, the Corporation was granted the right to  
18 exercise an option to pursue the Phase III Expansion of the Convention Center on the Property (the  
19 "Expansion Option"), but only if the Corporation timely satisfied several conditions. Those  
20 conditions included obtaining approval of entitlements for the Expansion, obtaining Port approval of  
21 Expansion financing, obtaining approval of the Port Master Plan by the California Coastal  
22 Commission, and amending the Convention Center management agreement between the Port and the  
23 City.

24           20.     So long as the promissory loan did not go into default, Defendants had full use of the  
25 property to construct the purportedly desired Phase III Expansion as set forth in section 49(i) of the  
26 lease.

27           21.     But in the event of a foreclosure of the purchase money deed of trust or the delivery  
28 of a deed (or assignment) in lieu of foreclosure, the leasehold interest in the Property would revert to

1 FAL for a hotel development without the Phase III Expansion, pursuant to Paragraph 9(h) of the  
2 ARC Lease.

3 22. Paragraph 49 of the ARC Lease states in part:

4 In the event of a transfer of this Lease to FIFTH AVENUE  
5 LANDING, LLC pursuant to Paragraph 9(h) of this Lease ..., Paragraph 50 will govern Lessee's obligations with respect to the  
6 redevelopment of the Premises and this Paragraph 49 will have no further force or effect.

7 23. And Paragraph 50 states in part:

8 If the Expansion Option terminates for any reason, [FAL] will develop  
9 a freestanding hotel without the [Phase III] Expansion . . . on the Premises.

10 24. Pursuant to Paragraph 50(h), upon termination of the Expansion Option, and once  
11 FAL acquires the necessary approvals from the Port and the California Coastal Commission, FAL  
12 may then negotiate a new 66-year lease of the Property and the Port is required to "diligently and in  
13 good faith negotiate a definitive lease agreement using [the Port's] then-standard lease form."

14 **The City's Role in the Phase III Expansion Project**

15 25. The Corporation is the City's wholly owned subsidiary, and at all relevant times, the  
16 City exercised substantial control over the Corporation's general operations:

- 17 (a) The City appoints the Corporation's board.  
18 (b) The City subsidizes the Corporation's budget.  
19 (c) The Corporation's financial statements demonstrate that it would likely not be  
20 able to satisfy any monetary judgment against it out of its own operating  
21 budget or assets unless the City allocated funds to it to pay a judgment against  
22 it.

23 26. Moreover, at all relevant times, the City has exercised nearly complete control over  
24 the Phase III Expansion. Indeed, in 2012, two years after entering into the ARC Lease, the  
25 Corporation transferred—and the City assumed—nearly every aspect of management and control of  
26 the Phase III Expansion contemplated under Paragraph 49 of the ARC Lease:

- 27 (a) The City appointed its own project manager for the Expansion project, John  
28 Casey, and in 2014 requested that FAL meet with him. FAL met with Mr.

Casey and the City's then-acting director of City Real Estate, Kristi Geitz, to discuss compatibility issues between the Phase III Expansion and FAL's marina operations. The Corporation was not represented at the meeting or in the discussions; only the City participated.

- (b) The City Public Works Department took control of the design and construction process for the Phase III Expansion.
- (c) The City Attorney took control of ongoing legal negotiations with the Port regarding the Phase III Expansion.
- (d) The consultant contract for the Phase III Expansion's project manager was transferred to the City with the project manager under the direct supervision of the Mayor instead of the Corporation's CEO.
- (e) All decision making with respect to the Expansion was transferred to the City.

**The City's Decision to Cause the Corporation to Default Under the ARC Lease**

27. As the due date of the Purchase Money Promissory Note approached, it became increasingly clear that the Corporation did not intend to meet its obligations under the ARC Lease and intended to default. The only way the Corporation could pay the Purchase Money Promissory Note was if the City provided it with the funds to do so. FAL wrote to the Corporation asking it to clarify its intentions with respect to the Purchase Money Promissory Note, but initially received no response.

28. On March 3, 2015, the Corporation's President and CEO, Carol Wallace, wrote to Ray Carpenter of FAL as follows:

Please allow me to apologize for the delay in responding to your correspondence dated January 13, 2015 and February 18, 2015.

As you are aware, the Corporation transferred the Phase III Expansion project to the City in 2012 and, as such, we are not the appropriate party to respond to inquiries regarding the status of the project.

I have forwarded copies of your correspondence to Jaymie Bradford of the Mayor's Office for further response.

29. The City remained silent, however, until April 1, 2015 (just prior to the default), when the Mayor's staff initiated negotiations with FAL to extend the due date of the Purchase



1 Money Promissory Note. During those negotiations, the Mayor's Chief of Staff, Steven Puetz, and  
2 Jaymie Bradford met with FAL and requested a free one-year extension. FAL agreed to an  
3 extension with continued interest payments.

4 30. Soon after that meeting, however, the City and the Corporation reversed course. On  
5 May 7, 2015, the 5-year anniversary of the Lease Purchase Agreement, the City and the Corporation  
6 declined the extension the City had requested and chose instead to default on the Purchase Money  
7 Promissory Note in what appears to have been a strategy to obtain use of the Property for the Phase  
8 III Expansion without paying what they owed FAL under the ARC Lease for this right.

9 31. Indeed, around the time of the Corporation's default, Corporation Board member  
10 Steve Cushman held private meetings with key business leaders and told them that he intended to get  
11 the Property back from FAL or give it "a haircut"—that is, pay FAL substantially less than what was  
12 owed under the May 7, 2010 Lease Purchase Agreement and the Purchase Money Promissory Note.

13 32. On May 28, 2015, the Corporation's Board voted to assign the ARC Lease to FAL in  
14 lieu of foreclosure and to terminate the Expansion Option and all of the Corporation's rights under  
15 the ARC Lease. Pursuant to the ARC Lease's terms, and as a direct consequence of the  
16 Corporation's payment default, the leasehold interest was transferred back to FAL under an  
17 Assignment in Lieu of Foreclosure (the "Assignment"). A true and correct copy of the Assignment  
18 is attached as **Exhibit E**. In the Assignment, the Corporation represented that it was assigning the  
19 lease to FAL "absolutely and free of any right of redemption or other right or interest of Borrower or  
20 anyone claiming by, through, or under Borrower."

21 33. The default also simultaneously extinguished the Corporation's Expansion Option  
22 under Paragraph 49 of the ARC Lease, and triggered FAL's right and obligation to pursue  
23 development of a hotel on the Property under Paragraph 50. In short, once the Corporation  
24 relinquished its interest in the Property back to FAL in May 2015, FAL's hotel was the only  
25 Property development allowed under the ARC Lease.

26 34. Further, because the Corporation's Expansion Option was now terminated, the  
27 Corporation—and its alter ego, the City—were contractually bound to act in good faith to allow FAL  
28 to pursue its contractual development rights.



**Defendants' Breach of the ARC Lease**

35. Even though the City and the Corporation's default extinguished any development rights or other legal interest they had in the Property, Defendants have continued ever since then to actively pursue a Phase III Expansion on the Property, in direct breach of the ARC Lease's terms.

36. As noted above, around the time of the Corporation's default, Corporation Board member Steve Cushman held private meetings with key business leaders and told them that he intended to get the Property back from FAL or give it "a haircut."

37. Meanwhile, The City is taking action to advance and finance the Phase III Expansion on the Property as part of a single enterprise with the Corporation and despite having caused the Corporation to forfeit its right to the Property back to FAL. To wit:

- (a) In June 2015, the Mayor contacted San Diego County Supervisor Greg Cox to make sure that the final Port Master Plan as approved by the Coastal Commission included the Phase III Expansion. FAL appeared at the hearing and objected to the final certification of the Port Master Plan because it included the Phase III Expansion.
- (b) On May 23, 2016, the Corporation's CEO announced public town hall meetings to discuss an expanded Convention Center on the Property.
- (c) In addition, the Mayor aggressively tried (unsuccessfully) to hold a special election to approve financing of the expansion in direct contravention of the ARC Lease's provisions entitling FAL to develop its hotel.

**FAL's Compliance with the ARC Lease After Defendants' Default**

38. Upon reacquiring the Property, FAL promptly pursued the entitlement of its hotel project in strict compliance with the express requirements of the ARC Lease. FAL spent two years and about \$2 million developing the hotel on Port property. This entailed, among other things, creation of architectural and engineering plans as well as preparation of an Environmental Impact Report in compliance with CEQA. FAL has met all contractual deadlines.

39. On January 6, 2016, FAL submitted its proposal to the Port for an 830-850 room, four-star hotel; a 560-bed, low-cost hotel; and an expanded marina. FAL's proposal is currently

proceeding through the entitlement process.

40. FAL's hotel project is estimated to bring significant benefits to the City and the Port, including:

- (a) \$7.5 million in new annual revenue to the Port;
- (b) 1,100 construction jobs;
- (c) 550–650 permanent jobs; and
- (d) \$9.8 million in new annual taxes for the City (under existing Transient Occupancy Tax rate).

41. On March 8, 2016, the Port's Board voted unanimously to authorize Port staff to move forward with CEQA review of FAL's hotel project, and the Draft Environmental Impact Report will be ready for public circulation in the fall of 2017.

**The Effects of Defendants' Breach and the City's Interference**

42. The City's and Corporation's actions frustrate FAL's ability to exercise its contractual rights under the ARC Lease because FAL's hotel development is subject to discretionary approval from the Port. Through the acts outlined above, and others, the City has unabashedly interfered, and continues to interfere, with the Port approval process. Defendants' conduct has in fact hampered FAL's progress in developing its hotel under the ARC Lease.

43. On information and belief, FAL alleges that the City and the Corporation also know – and intend – that their actions are likely to have adverse impacts on FAL's ability to move forward with other matters essential to their project including, for example, negotiations with lenders or investors, hotel operators and representatives of labor.

44. Moreover, Defendants' conduct is erecting roadblocks in the Port approval process. Indeed, on June 10, 2015, six weeks after the default, the Port—with the active encouragement and assistance of the Corporation and the City and over FAL's objection—pursued and obtained the Coastal Commission's certification of a Master Plan Amendment that still allowed for the development of a Phase III Expansion on the Property even though the Expansion Option had been voluntarily terminated by the City's and the Corporation's actions. And even though the Expansion Option and the City / Corporation's leasehold interest terminated in May, 2015, the Port has

1 continued to publicly recognize the Convention Center Expansion as a potential project.

2 45. FAL has asked Defendants to stop giving the public the impression that they have the  
3 right to build on FAL's land, but Defendants have continued in the same course of conduct.

4 **FIRST CAUSE OF ACTION**

5 **Breach of the ARC Lease, the Lease Purchase Agreement, and the Purchase Promissory Note**  
6 **(Against all Defendants)**

7 46. All preceding allegations are incorporated herein by reference.

8 47. FAL and Defendants have written agreements providing for the allocation of certain  
9 rights and obligations regarding the Property. *See* Exhibits A (the ARC Lease), B (the Lease  
10 Purchase Agreement), and C (the Purchase Money Promissory Note). Those written agreements  
11 together provide that if Defendants default on their payment obligations to FAL, the leasehold  
12 interest in the Property will revert to FAL, and Defendants will no longer have any right or ability to  
13 have any control over the Property.

14 48. FAL fully performed and complied with all obligations under the ARC Lease, the  
15 Lease Purchase Agreement, and the Purchase Money Promissory Note at all times.

16 49. The City and the Corporation defaulted on their payment obligations under the ARC  
17 Lease, the Lease Purchase Agreement, and the Purchase Money Promissory Note. As a result, the  
18 City and the Corporation transferred the Property back to FAL and forfeited all rights to the Property  
19 under those contracts.

20 50. Despite the fact that the City's and the Corporation's default extinguished any  
21 development rights or other legal interest they had in the Property, Defendants have continued ever  
22 since then to actively pursue a Phase III Expansion on the Property, in direct breach of the ARC  
23 Lease's terms. The City and the Corporation have engaged in conduct designed to deprive FAL of  
24 its contractual rights by the follow actions, among others:

- 25 (a) Around the time of the Corporation's default, Corporation Board member  
26 Steve Cushman held private meetings with key business leaders and told them  
27 that he intended to get the Property back from FAL or give it "a haircut"—that  
28 is, pay FAL substantially less than what was owed under the Lease Purchase

Agreement and the Purchase Money Promissory Note.

- (b) In June 2015, the Mayor contacted San Diego County Supervisor Greg Cox to make sure that the final Port Master Plan as approved by the Coastal Commission included the Phase III Expansion;
- (c) On May 23, 2016, the Corporation's CEO announced public town hall meetings to discuss an expanded Convention Center on the Property.
- (d) The Mayor aggressively tried (unsuccessfully) to hold a special election, at great expense to the citizens, to approve financing of a Phase III Expansion; and
- (e) Defendants met individually with members of the Port Board to lobby against approval of the FAL hotel project.

51. As a result of Defendants' breaches, FAL has sustained damage in an amount to be proven at trial.

## **SECOND CAUSE OF ACTION**

### **Breach of Assignment in Lieu of Foreclosure (Against the City and the Corporation)**

52. All preceding allegations are incorporated herein by reference.

53. Plaintiff and the City, through its alter ego, the Corporation, entered into the Assignment to transfer the ARC Lease back to Plaintiff. In that Assignment, the City, through its alter ego, the Corporation, represented that it was assigning to FAL the lease "absolutely and free of any right of redemption or other right or interest of Borrower or anyone claiming by, through, or under Borrower."

54. FAL fully performed and complied with all obligations under the Assignment at all times.

55. The City and its alter ego, the Corporation, have breached the Assignment by continuing to assert a right to use the property as described above.

56. As a result of the City's and the Corporation's breaches, Plaintiff has been damaged in an amount to be determined at trial.

**THIRD CAUSE OF ACTION**

**Intentional Interference with Contractual Relations  
(Against the City)**

57. All preceding allegations are incorporated herein by reference.

58. Plaintiff had valid agreements with the Corporation under the ARC Lease and the Assignment.

59. The City knew of the valid agreements under the ARC Lease and the Assignment under which (a) FAL had the exclusive right to develop a hotel without a convention center expansion, and (b) the Corporation and the Port had the obligation to exercise diligent and good faith efforts to allow FAL to exercise its development rights under those agreements.

60. Despite knowledge of these agreements, on information and belief, the City intended to induce the Corporation to breach its agreements with FAL as alleged in this Complaint.

61. The City continues to interfere with FAL's rights under the contract as set forth in this Complaint.

62. The City's conduct has prevented, and has made more expensive and difficult, FAL's ability to perform its rights and obligations under the contract as set forth in this Complaint.

63. Plaintiff has been harmed by the City's unlawful conduct, and the City's unlawful conduct was and is a substantial factor in causing Plaintiff to be damaged in an amount that is in excess of this Court's minimum jurisdiction and will be established at trial.

**FOURTH CAUSE OF ACTION**

**Intentional Interference with Prospective Economic Relations  
(Against the City and the Corporation)**

64. All preceding allegations are incorporated herein by reference.

65. Plaintiff was and has been in economic relationships with lenders, investors, hotel operators, and representatives of labor that probably would have resulted in an economic benefit to Plaintiff.

66. The City and the Corporation knew of those relationships and, on information and belief, intended to disrupt those relationships by engaging in wrongful conduct as alleged in this

1 Complaint.

2 67. Plaintiff's economic relationships with lenders, investors, hotel operators, and  
3 representatives of labor have been disrupted, causing harm to Plaintiff.

4 68. The City's and the Corporation's wrongful conduct was and is a substantial factor in  
5 causing Plaintiff to be damaged in an amount that is in excess of this Court's minimum jurisdiction  
6 and will be established at trial.

7 **FIFTH CAUSE OF ACTION**

8 **Implied Covenant of Good Faith and Fair Dealing**  
9 **(Against the City and the Corporation)**

10 69. All preceding allegations are incorporated herein by reference.

11 70. The ARC Lease, the Lease Purchase Agreement, the Purchase Money Promissory  
12 Note, and the Assignment each contain an implied covenant of good faith and fair dealing that the  
13 Corporation and its alter ego, the City, would not seek to deprive FAL of the benefits of the  
14 agreements.

15 71. The City's and the Corporation's actions described herein breached the implied  
16 covenant of good faith and fair dealing owed to plaintiffs. Specifically, the City's and the  
17 Corporation's actions in interfering with the Port approval process and asserting a legal interest in  
18 the Property when none exists constitute breaches of the implied covenant of good faith and fair  
19 dealing as set forth in the aforementioned agreements.

20 72. As a result of the City's and the Corporation's breaches of the implied covenant of  
21 good faith and fair dealing, plaintiffs have been damaged in an amount to be proven at trial.

22 **SIXTH CAUSE OF ACTION**

23 **Preliminary and Permanent Injunctive Relief**  
24 **(Against all Defendants)**

25 73. All preceding allegations are incorporated herein by reference.

26 74. Defendants' actions alleged above, and their ongoing interference with FAL's hotel  
27 development project, have caused, and unless enjoined by this Court will continue to cause,  
28 irreparable damage to Plaintiff. Because Defendants persist in the conduct alleged above, money

1 damages will not afford adequate relief, further necessitating the need for injunctive relief.

2 75. Accordingly, Plaintiff prays the Court to issue a preliminary and permanent  
3 injunction enjoining defendants, and any of their employees or agents, from interfering with FAL's  
4 hotel development project, or otherwise asserting any existing legal interest under which they may  
5 pursue an expansion of the Convention Center on the Property, in contravention of FAL's rights  
6 under the ARC Lease and the Assignment granting FAL exclusive rights to develop a hotel without  
7 such expansion.

8 **SEVENTH CAUSE OF ACTION**

9 **Declaratory Relief**  
10 **(Against all Defendants)**

11 76. All preceding allegations are incorporated herein by reference.

12 77. A dispute exists and an actual controversy has arisen in that Plaintiff contends that the  
13 City and the Corporation are in breach of the ARC Lease, the Lease Purchase Agreement, the  
14 Purchase Money Promissory Note, and the Assignment by taking the actions described above. The  
15 City and the Corporation, for their part, deny that they are in breach of the ARC Lease.

16 78. Plaintiff has no other adequate or speedy remedy at law to resolve this dispute.

17 79. Plaintiff requests that this Court declare that the Corporation's actions—and the  
18 actions of the City as the Corporation's alter ego—breach the ARC Lease, the Lease Purchase  
19 Agreement, the Purchase Money Promissory Note, and the Assignment.

20 **PRAYER FOR RELIEF**

21 **WHEREAS**, Plaintiff prays for relief as follows:

- 22 1. For compensatory damages;
- 23 2. For preliminary and permanent injunctive relief, including but not limited to, an order  
24 enjoining the City and the Corporation, and any of their employees or agents, from  
25 interfering with FAL's hotel development project, or otherwise asserting any existing  
26 legal interest under which they may pursue an expansion of the Convention Center on  
27 the Property, in contravention of FAL's rights under the ARC Lease and the  
28 Assignment granting FAL exclusive rights to develop a hotel without such expansion;




3. For declaratory relief, including but not limited to, an order declaring that the Corporation's actions—and the actions of the City as the Corporation's alter ego—breach the ARC Lease, the Lease Purchase Agreement, the Purchase Money Promissory Note, and the Assignment.
4. For attorneys' fees and costs; and
5. For any other relief as the Court may deem appropriate.

Dated: September 22, 2017

THORSNES BARTOLOTTA MCGUIRE LLP

By:

  
VINCENT J. BARTOLOTTA, JR., ESQ.  
KAREN R. FROSTROM, ESQ.  
Attorneys for Plaintiff  
FIFTH AVENUE LANDING

A

San Diego Unified Port District

Document No. **56486**

Filed **MAY 06 2010**  
Office of the District Clerk

**SAN DIEGO UNIFIED PORT DISTRICT  
AMENDED, RESTATED AND COMBINED LEASE TO  
SAN DIEGO CONVENTION CENTER CORPORATION  
OF PROPERTY LOCATED AT  
FIFTH AVENUE AND MARINA PARK WAY  
SAN DIEGO, CALIFORNIA  
COMMENCING JULY 1, 1984  
AND ENDING JUNE 30, 2024**

**TRIPPLICATE ORIGINAL**

## TABLE OF CONTENTS

<u>Paragraph/Exhibit</u>	<u>Page Number(s)</u>
1. TERM .....	3
2. USE .....	4
2.1 UNAUTHORIZED USE CHARGE .....	5
3. RENT .....	5
3.1 COST OF LIVING RENT ADJUSTMENTS .....	11
3.2 RENT REVIEW .....	12
4. IMPROVEMENTS .....	14
5. CONSTRUCTION OF IMPROVEMENTS .....	15
6. TITLE TO IMPROVEMENTS .....	15
7. LIENS .....	16
8. LEASE ENCUMBRANCE .....	17
9. ASSIGNMENT - SUBLEASE .....	23
10. DEFAULTS AND REMEDIES .....	26
11. BANKRUPTCY .....	29
12. EMINENT DOMAIN .....	30
13. TERMINATION OF PRIOR AGREEMENTS .....	30
14. USE OBLIGATION .....	30
15. MAINTENANCE AND REPAIR .....	31
16. PERFORMANCE BOND .....	32
17. TAXES AND UTILITIES .....	32
18. CONFORMANCE WITH LAWS AND REGULATIONS .....	33
19. EQUAL EMPLOYMENT OPPORTUNITY AND NONDISCRIMINATION .....	33
20. PARTIAL INVALIDITY .....	34
21. HOLD HARMLESS .....	34
22. SUCCESSORS IN INTEREST .....	34
23. EASEMENTS .....	34
24. TITLE OF LESSOR .....	35
25. INSURANCE .....	35
26. POLICY OF LESSOR .....	38
27. WARRANTIES-GUARANTEES-COVENANTS .....	39
28. DAMAGE TO OR DESTRUCTION OF LEASED PREMISES .....	39
29. QUITCLAIM OF LESSEE'S INTEREST UPON TERMINATION .....	39
30. PEACEABLE SURRENDER .....	39
31. WAIVER .....	40
32. HOLDOVER .....	40
33. PARAGRAPH HEADINGS .....	40
34. ENTIRE UNDERSTANDING .....	40
35. TIME IS OF THE ESSENCE .....	41
36. NOTICES .....	41
37. REMOVAL OF MATERIALS .....	41
38. WASTE/NUISANCE .....	42

39. NUMBER AND GENDER.....	42
40. APPLICABLE LAW.....	42
41. ATTORNEY FEES .....	42
42. HAZARDOUS MATERIALS.....	42
43. STORAGE TANKS.....	46
44. ENVIRONMENTAL DISCLOSURES.....	47
45. AS-IS LEASE AND WAIVERS .....	51
46. JOINT AND SEVERAL LIABILITY.....	54
47. SECURITY DEPOSIT .....	54
48. DISPUTE RESOLUTION .....	58
49. REDEVELOPMENT OF THE PREMISES.....	58
50. DEVELOPMENT OF HOTEL .....	62
51. MEMORANDUM OF LEASE.....	88

#### **GUARANTY**

Exhibit "A"	Legal Description of Premises
Exhibit "B"	Plat of Premises
Exhibit "C"	Plat of Expansion and Expansion Hotel Sites
Exhibit "D"	Expansion and Expansion Hotel Entitlement Schedule
Exhibit "E"	Expansion Lease Term Sheet
Exhibit "F"	Hotel Entitlement Schedule
Exhibit "G"	Competitive Hotel Set
Exhibit "H"	Hotel Lease Term Sheet

## LEASE

THIS AMENDED, RESTATED AND COMBINED AGREEMENT (the "Lease"), made and entered into this 6<sup>th</sup> day of April, 2010 ("ARC Effective Date"), by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, hereinafter called "Lessor," and SAN DIEGO CONVENTION CENTER CORPORATION, a non-profit public benefit corporation, hereinafter called "SDCCC" and "Lessee," for purposes of amending, restating and combining that original lease agreement, as amended, by and between Lessor and Sea Group Construction, Inc., dated October 9, 1984, and as further outlined below; WITNESSETH:

WHEREAS, Lessor and SEA GROUP CONSTRUCTION, INC., a California corporation, heretofore on the 9th day of October, 1984, entered into a Lease of certain tidelands in the city of San Diego, California, which Lease is on file in the Office of the Clerk of Lessor bearing Document No. 17439 and

WHEREAS, SEA GROUP CONSTRUCTION, INC., a California corporation, assigned said Lease to RAYMOND ALLEN CARPENTER on the 15th day of December, 1987, which Assignment and Assumption of Lease Agreement is on file in the Office of the Clerk of Lessor bearing Document No. 21586; and

WHEREAS, Lessor and RAYMOND ALLEN CARPENTER, heretofore on the 18th day of April, 1989, entered into an Agreement for Amendment of Lease, Amendment No. 1, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 23678; and

WHEREAS, Lessor and RAYMOND ALLEN CARPENTER, heretofore on the 9th day of January, 1990, entered into an Agreement for Amendment of Lease, Amendment No. 2, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 24712; and

WHEREAS, Lessor and RAYMOND ALLEN CARPENTER, heretofore on the 29th day of April, 1991, entered into an Agreement for Amendment of Lease, Amendment No. 3, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 26859; and

WHEREAS, RAYMOND ALLEN CARPENTER assigned an undivided fifty percent (50%) interest in said Lease to CALIFORNIA PROPERTIES, a California general partnership, on the 7th day of October, 1991, which Assignment and Assumption of Lease Agreement is on file in the Office of the Clerk of Lessor bearing Document No. 27602; and

WHEREAS, RAYMOND ALLEN CARPENTER and CALIFORNIA PROPERTIES, a California general partnership, assigned said Lease to FIFTH AVENUE LANDING, a California general partnership, on the 7th day of October, 1991, which Assignment and Assumption of Lease Agreement is on file in the Office of the Clerk of Lessor bearing Document No. 27603; and

WHEREAS, Lessor and FIFTH AVENUE LANDING, a California general partnership, heretofore on the 6th day of September, 1992, entered into an Agreement for Amendment of Lease, Amendment No. 4, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 28826; and

WHEREAS, Lessor and FIFTH AVENUE LANDING, a California general partnership, heretofore on the 30th day of November, 1993, entered into an Agreement for Amendment of Lease, Amendment No. 5, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 30620; and

WHEREAS, Lessor and FIFTH AVENUE LANDING, a California general partnership, heretofore on the 23rd day of August, 1994, entered into an Agreement for Amendment of Lease, Amendment No. 6, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 31752; and

WHEREAS, Lessor and FIFTH AVENUE LANDING, a California general partnership, heretofore on the 26th day of September, 1995, entered into an Agreement for Amendment of Lease, Amendment No. 7, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 33405; and

WHEREAS, Lessor and FIFTH AVENUE LANDING, a California general partnership, heretofore on the 7th day of January, 1997, entered into an Agreement for Amendment of Lease, Amendment No. 8, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 35363; and

WHEREAS, Lessor and FIFTH AVENUE LANDING, a California general partnership, heretofore on the 17th day of March 2000, entered into an Agreement for Amendment of Lease, Amendment No. 9, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 40016; and

WHEREAS, FIFTH AVENUE LANDING, a California general partnership, assigned said Lease to FIFTH AVENUE LANDING, LLC, a California limited liability company, on the 1st day of July 2003, which Assignment and Assumption of Lease Agreement is on file in the Office of the Clerk of Lessor bearing Document No. 46576; and

WHEREAS, Lessor and FIFTH AVENUE LANDING, LLC, a California limited liability company, heretofore on the 7th day of October 2003, entered into an Agreement for Amendment of Lease, Amendment No. 10, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 46577; and

WHEREAS, Lessor and FIFTH AVENUE LANDING, LLC, a California limited liability company, heretofore on the 6th day of August 2006, entered into an Agreement for



Amendment of Lease, Amendment No. 11, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 50952; and

WHEREAS, on January 1, 2007, the description of the Leased Premises was automatically amended to the description of the Expanded Leased Premises, all provisions of the Lease are applicable to the Expanded Leased Premises and all references to the Leased Premises, shall refer to the Expanded Leased Premises.

WHEREAS, Lessor and FIFTH AVENUE LANDING, LLC, a California limited liability company, heretofore on the 13th day of February 2007, entered into an Agreement for Amendment of Lease, Amendment No. 12, which Amendment is on file in the Office of the Clerk of Lessor bearing Document No. 51512; and

WHEREAS, FIFTH AVENUE LANDING, LLC, a California limited liability company assigned said Lease to Lessee on the 6<sup>th</sup> day of April, 2010, which Assignment and Assumption of Lease Agreement is on file in the Office of the Clerk of Lessor bearing Document No. 56484; and

WHEREAS, as a part of the aforesaid assignment from FIFTH AVENUE LANDING, LLC to Lessee, Lessor approved an encumbrance of Lessee's leasehold in the form of a deed of trust ("SDCCC Deed of Trust") securing a portion of the purchase price paid by Lessee to FIFTH AVENUE LANDING, LLC for such assignment, which is on file in the Office of the Clerk of Lessor Bearing Document No. 56485; and

WHEREAS, Lessor and Lessee are mutually desirous of further amending said Lease;

NOW THEREFORE, Lessor, for the consideration hereinafter set forth, hereby leases to Lessee for the term and upon the conditions hereinafter set forth, a portion of those lands within Lessor's jurisdiction, which lands are more particularly described as follows:

Approximately 147,642 square feet of tideland area located on Parcel No. 1 and approximately 45,590 square feet of tideland area located on Parcel No. 2, with both parcels located on Convention Way and Marina Park Way in the City of San Diego, California, more particularly described and delineated on Lessor's Drawing No. 019-063 dated MAR 18 2010, attached hereto as Exhibits "A" and "B" and by this reference made a part hereof, hereinafter "Leased Premises".

TO HAVE AND TO HOLD said Leased Premises for the term of the Lease and upon the conditions as follows:

1. **TERM:** The term of the Lease shall be for a period of forty (40) years, commencing on the 1<sup>st</sup> day of July 1984, hereinafter called the "Commencement Date," and ending on the 30th day of June 2024, hereinafter called the "Termination Date," unless sooner terminated as herein provided.

## **2. USE:**

- (a) **Leased Premises.** Lessee agrees that Parcel No. 1 of the Leased Premises shall be used only and exclusively for public parking, meetings, exhibitions, trade shows and special events. Parcel No. 2 of the Leased Premises shall be used only and exclusively for a public park/plaza that shall, at a minimum, be open and available for public use between the hours of 6:00 a.m. and 10:30 p.m. seven (7) days a week unless Lessee is directed in writing by the Lessor's Executive Director, in his or her sole and absolute discretion, to maintain a different schedule.
- (b) **Temporary Special Events.** Lessee may hold temporary special events (generally less than forty-eight (48) hours each, excluding setup and breakdown times), such as, without limitation, weddings, holiday parties, concerts, conventioner meetings, lectures, etc. in portions of said public park/plaza area located on Parcel Nos. 1 and 2 of the Leased Premises and Lessee may grant permission and charge reasonable fees and impose reasonable requirements for other organizations and groups to hold such temporary special events in the public park/plaza area. Said temporary special events will be subject to the provisions of a "Master Special Events Permit" which shall be issued from time-to-time by Lessor to Lessee, which Permit will require Lessee to comply with Lessor's "Special Event Procedures and Guidelines" (which may be amended from time-to-time). Each such Master Special Events Permit shall include, but is not limited to, the following provisions: (i) a minimum term of three (3) years which is renewable upon request of Lessee unless this Lease has expired or been terminated; (ii) Lessee will be responsible for the issuance of sub-permits to other organizations and groups; (iii) Lessee may require that sub-permittees utilize Lessee's personnel, facilities, catering, and similar services and pay reasonable fees to Lessee for such services; (iv) said Special Event Procedures and Guidelines, as amended from time-to-time, shall not be inconsistent with the rights of Lessee under this Lease; (v) Lessee shall maintain reasonable public access through the public park/plaza to San Diego Bay at all times, including during special events and (vi) as per Lessor's Port Master Plan, "at no time will public access to the sidewalk promenade be fenced, screened or blocked off by any structure," unless Lessor's Port Master Plan is otherwise amended. The foregoing notwithstanding, Lessee may control lateral access to the sidewalk promenade in connection to its special events provided longitudinal access to and along the sidewalk promenade remains unrestricted at all times and further provided that such controlled access is consistent with applicable District and California Coastal Commission rules, regulations and policies. The sidewalk promenade is designated on the attached Exhibit "B" by the public pedestrian access easements located throughout the Premises.

Further, Lessee shall pay Lessor the appropriate rent due for such temporary special events pursuant to Paragraph 3 below. The foregoing notwithstanding, for so long as SDCCC or Permitted Assignee (defined below) is the Lessee under this Lease, the term of the Master Special Events Permit shall run from its initial issuance to the termination of this Lease.

**2.1 UNAUTHORIZED USE CHARGE:** Lessee shall pay Lessor Twenty Percent (20%) of the gross receipts for any service or use that is not permitted under this Lease. This payment is subject to the due date for rent and the provisions for delinquent rent provided in Paragraph 3 herein. The existence of the Twenty Percent (20%) charge in this Paragraph and the payment of this charge or any part thereof, does not constitute an authorization for a particular service or use, and does not waive any Lessor rights to terminate a service or use or to default Lessee for participating in or allowing any unauthorized use of the Leased Premises..

**3. RENT:** Lessee agrees to pay to Lessor rent in accordance with the following:

- (a) The remaining term of this Lease shall be divided into the following rental periods, hereinafter "Rental Periods":

April 6, 2010 (insert ARC Effective Date) - April 5, 2020 (insert 10 years following ARC Effective Date)  
("first remaining Rental Period")

April 5, 2020 (insert date 10 years and one day from ARC Effective Date) -- June 30, 2024  
("second remaining Rental Period")

- (b) The rent for the first remaining Rental Period of this Lease shall be a minimum of Three Hundred Seventy Six Thousand Dollars (\$376,000) per year, hereinafter "Minimum Annual Rent," subject to adjustment described in Paragraph 3.1 herein, or the cumulative total of the percentage rents per year as provided in (c) below, whichever is greater.
- (c) Percentage rents shall be calculated on a monthly basis and shall be based on the following percentages of the gross income as defined in subparagraph (j) herein:
- (1) Fifteen Percent (15%) of the gross income from sale of parking services or rental of parking spaces.
  - (2) Three Percent (3%) of the gross income from sale of food related and from sale of catered food on the Leased Premises.
  - (3) Five Percent (5%) of the gross income from sale of alcoholic and nonalcoholic beverages from sale of catered alcoholic and nonalcoholic beverages on the Leased Premises.

- (4) Ten Percent (10%) of the gross income from temporary special events in the public park/plaza area of the Leased Premises not covered by subparagraphs 3(c)(2) and 3(c)(3) above.
  - (5) Ten Percent (10%) of the gross income from any and all activities, operations, and enterprises permitted under the terms of the Lease and not otherwise addressed within the foregoing provisions.
  - (6) Twenty Percent (20%) of the gross income from any and all services or uses not permitted under the terms of the Lease and not otherwise addressed within the foregoing provisions.
- (d) The rent for the second and third remaining Rental Periods and any extension thereof shall be adjusted in accordance with Paragraphs 3.1 and 3.2 herein.
- (e) On or before the 20th day of each month, Lessee shall render to Lessor, in a form prescribed by Lessor, a detailed report of gross income for that portion of the accounting year which ends with and includes the last day of the previous calendar month. The accounting year shall be 12 full calendar months. The first accounting year shall begin on the first day of the first month during which the percentage rent described in this Lease becomes effective. Subsequent accounting years shall begin upon each anniversary of that date during the Lease term or any extension thereof. Each report shall be signed by Lessee or its responsible agent under penalty of perjury and shall include the following:
- (1) The total gross income for said portion of the accounting year, itemized as to each of the business categories for which a separate percentage rent rate is established.
  - (2) The related itemized amounts of percentage rent computed, as herein provided, and the total thereof.
  - (3) The total rent previously paid by Lessee for the accounting year within which the preceding month falls.

Concurrently with the rendering of each monthly statement, Lessee shall pay the greater of the following two amounts:

- (4) The total percentage rent computed for that portion of the accounting year ending with and including the last day of the preceding month [Item (2) above], less total rent previously paid for the accounting year [Item (3) above], or

- (5) One-twelfth (1/12th) of the Minimum Annual Rent, multiplied by the number of months from the beginning of the accounting year to and including the preceding month, less total rent previously paid for the accounting year [Item (3) above].
- (f) All payments shall be delivered to and statements required in Paragraph (e) above shall be filed with Lessor's Treasurer. Checks shall be made payable to the San Diego Unified Port District and mailed to the Treasurer's Office, San Diego Unified Port District, Post Office Box 120488, San Diego, California 92112-0488, or delivered to the Treasurer's Office, San Diego Unified Port District, 3165 Pacific Highway, San Diego, California. Lessor may change the designated place of payment and filing at any time upon ten (10) days' written notice to Lessee. Lessee assumes all risk of loss and responsibility for Late Charges, as hereinafter described, if payments are made by mail.
- (g) Lessee hereby acknowledges that late payment by Lessee to Lessor of rent and other sums due hereunder will cause Lessor to incur costs not contemplated by this Lease. Accordingly, in the event Lessee is delinquent in rendering to Lessor an accounting of rent due or in remitting the rent due in accordance with the rent provisions of this Lease, Lessee shall pay, in addition to the unpaid rent, five percent (5%) of the delinquent rent. If rent is still unpaid at the end of fifteen (15) days, Lessee shall pay an additional five percent (5%) [being a total of ten percent (10%)] (collectively, "Late Charges"). The parties hereby agree that said Late Charges are additional rent and are not interest, and that said Late Charges are appropriate to compensate Lessor for loss resulting from rent delinquency including, without limitation, lost opportunities, and the cost of servicing the delinquent account. Acceptance of such Late Charges and any portion of the late payment by Lessor shall in no event constitute a waiver of Lessee's default with respect to such overdue amount, nor prevent Lessor from exercising any of its other rights and remedies. The Executive Director of Lessor shall have the right, in his or her sole and absolute discretion, to waive for good cause any Late Charges upon written application of Lessee for any such delinquency period.
- (h) All payments by Lessee to Lessor shall be by a good and sufficient check. No payment made by Lessee or receipt or acceptance by Lessor of a lesser amount than the correct amount of rent due under this Lease shall be deemed to be other than a payment on account of the earliest rent due hereunder, nor shall any endorsement or statement on any check or any letter accompanying any check or payment be deemed an accord and satisfaction, and Lessor may accept such check or payment without prejudice to Lessor's right to recover the balance or pursue any other available remedy.

- (1) Lessee shall, at all times during the term of this Lease, keep or cause to be kept, accurate and complete records and double entry books of account of all financial transactions in the operation of all business activities, of whatever nature, conducted in pursuit of the rights granted herein. The records must be supported by source documents of original entry such as sales invoices, cash register tapes, bank depository documentation, purchase invoices, or other pertinent supporting documents. Financial statements (a balance sheet and income/expence statement), based upon the double entry books of account, shall be prepared not less than annually.

All sales under this lease shall be recorded by means of a comprehensive system which includes sufficient business processes to ensure that all monies received are clearly and accurately recorded and are documented by system reports and /or original source documents. The system shall provide appropriate reporting and distinction of all sales categories and be able to generate an audit trail of all transactions. Sales may also be recorded by another system if first approved in writing by the Executive Director of Lessor.

Contracts, bills, invoices, sales receipts or other similar-type documents evidencing transactions between any parties doing business under this Lease (including sublessees) shall in no event identify rent due to Lessor as a separate charge, fee or tax.

All Lessee's books of account, records, financial statements, and documentation related to this Lease or to business operations conducted within or from the Leased Premises, shall be kept either at the Leased Premises or at such other locations as are acceptable to Lessor. Lessor shall have the right at any and all reasonable times, following a notice provided to Lessee 10 business days in advance, to examine and audit said books, records, financial statements, and documentation, without restriction, for the purpose of determining the accuracy thereof, the accuracy of the monthly statements of gross income submitted, and the accuracy of the rent paid to the Lessor. In the event that the Lessee's business operations conducted within or from the Leased Premises are part of a larger business operation of the Lessee, and any part of the books, records, financial statements and documentation required herein is prepared only for the larger operation, and not solely for the business operations of the Leased Premises, then the Lessor shall also have the right to examine and audit that part of said books, records, financial statements, and documentation of the larger business operation.

Lessee's failure to keep such books of account, records, financial statements, and documentation and make them available for inspection by Lessor is a

breach of this Lease and cause for termination. The Executive Director of Lessor shall have the discretion to require the installation of any additional accounting methods or controls he may deem necessary, subject to prior written notice. In the event the Lessee does not make available the original records and books of account at the Leased Premises or within the limits of San Diego County, Lessee agrees to pay all necessary travel expenses incurred by Lessor in conducting an audit at the location where said records and books of account are maintained.

Additionally, if the audit reveals a discrepancy of more than five percent (5%) between the rent due as reported by Lessee and the rent due as determined by the audit, and/or Lessee has failed to maintain complete and accurate books of account, records, financial statements, and documentation in accordance with this Lease, then Lessee shall pay the cost of the audit, as determined by the Executive Director of Lessor, plus the rent determined to have been underpaid. In addition, should Lessee fail to pay said amounts within thirty (30) days after written notice from Lessor, then Lessee shall pay an additional fee of ten percent (10%) of said unpaid amounts as compensation to Lessor for administrative costs as previously described herein, along with the rent determined to have been underpaid.

Furthermore, if the audit reveals that rent due to Lessor is less than five percent (5%) between the rent due as reported by Lessee and the rent due as determined by the audit, and should Lessee fail to pay said unpaid rent within thirty (30) days after written notice from Lessor, then Lessee shall pay an additional fee of ten percent (10%) of said unpaid rent as compensation to Lessor for administrative costs as previously described herein, along with the rent determined to have been underpaid.

Lessee agrees to pay such amounts as set forth above. Acceptance of late charges and any portion of the late payment by Lessor shall in no event constitute a waiver of Lessee default with respect to late payment, nor prevent Lessor from exercising any of the other rights and remedies granted in this Lease. The Executive Director of Lessor shall have the right to waive for good cause any late charges upon written application of Lessee for any such delinquency period.

If the audit reveals that rent has been overpaid by Lessee, then Lessor shall credit Lessee in the amount of said overpayment which credit shall be used to offset future rental payment(s) due Lessor.

- (i) Gross Income shall include all income resulting from operations, businesses and commercial activities conducted on or from the Leased Premises or any



other property that is located within Lessor's jurisdiction (unless such income is being reported under another agreement with Lessor):

- (1) whether conducted by Lessee, its sublessees or concessionaires, or parties operating through Lessee, its sublessees, or concessionaires;
- (2) whether conducted with or without an agreement with Lessor or a tenant of Lessor or a tenant of Lessee;

Gross income shall include revenue from whatever source derived including, but not limited to: (i) sales via the Internet; (ii) sales via telephone; (iii) agency sales; and (iv) any other type of sales (whether such sales occur from the Leased Premises or elsewhere) resulting in Lessee's customers receiving services, products, or benefits on or from the Leased Premises and whether for cash or credit, excluding operations, businesses and commercial activities conducted within Phases I and/or II of the existing San Diego Convention Center.

Gross income shall include any manufacturer's or importer's excise tax included in the prices of the goods sold, even though the manufacturer or importer is also the retailer thereof, and it is immaterial whether the amount of such excise tax is stated as a separate charge.

Gross income, however, shall not include any of the following: (1) sales of United States postage; (2) any sales or excise taxes payable by Lessee to any governmental agency as a direct result of operations under this Lease, provided that the amount of such taxes is shown on the books and records elsewhere herein required to be maintained; (3) gratuities, provided the customer voluntarily determines the amount of said gratuity to be paid, or the customer is aware that the Lessee has added a pre-established gratuity to the charge for the services rendered and said additional amount is segregated and identified as a gratuity on the billing to the customer; and (4) ticket sales price (If this Lease allows ticket sales for events that will occur on property not within Lessor's jurisdiction for events or activities in which Lessee has no ownership interest [e.g., San Diego Zoo, San Diego Wild Animal Park, Sea World, Caribbean cruises, etc.] gross income shall include all income, fees and commissions that Lessee receives as compensation for handling and making said ticket sales).

Further, refunds for goods returned shall be deducted from current gross income upon their return.

Bad debt losses shall not be deducted from gross income.

### **3.1 COST OF LIVING RENT ADJUSTMENTS:**

- (a) This Lease shall provide for the following mid-term Rental Period adjustment dates, hereinafter "Adjustment Dates":

April 15, 2015 (Insert date five years following the ARC Effective Date)

- (b) On the referenced Adjustment Dates, the Minimum Annual Rent specified in Paragraphs 3(b) and 3(d) herein shall be adjusted by the increase, if any, in the Consumer Price Index for All Urban Consumers for Los Angeles/Riverside/Orange County, CA/All Items based on the period 1982-84 = 100 as published by the United States Department of Labor's Bureau of Labor Statistics, hereinafter "CPI". The Minimum Annual Rent payable pursuant to Paragraphs 3(b) and 3(d) of this Lease shall be multiplied by a fraction, the numerator of which shall be the CPI for the calendar month which is three months prior to the Adjustment Date under consideration, and the denominator of which shall be the CPI for the calendar month which is three months prior to commencement of the then-current Rental Period. The sum so calculated shall constitute the new Minimum Annual Rent herein, but in no event shall such new Minimum Annual Rent be less than the Minimum Annual Rent payable for the Rental Period immediately preceding said Adjustment Date.

In the event the CPI is no longer published, the index for the Adjustment Date shall be the one reported in the U. S. Department of Labor's comprehensive official index most nearly corresponding to the foregoing description of the CPI. If the herein-described Department of Labor indices are no longer published, another index generally recognized as authoritative shall be substituted by agreement of the parties. If they are unable to agree within sixty (60) days after demand by either party, a substitute index will be selected by the Chief Officer of the San Francisco Regional Office of the Bureau of Labor Statistics or its successor.

Notwithstanding the publication dates of the CPI, the Minimum Annual Rent shall be adjusted to be effective on the Adjustment Dates. Until said Minimum Annual Rent Adjustment can be reasonably determined by CPI publication, Lessee shall continue to make rent payments pursuant to this Lease at the same rent in effect at the then-current Rental Period. Because of this provision, underpayments of rent shall be immediately paid to the Lessor.

### **3.2 RENT REVIEW:**

- a) Beginning with the Rental Period which commences July 1, 2016, the rent as specified in Paragraphs 3(b) and 3(c) herein shall be mutually agreed upon by Lessor and Lessee; provided, however, that (i) the Minimum Annual Rent agreed to at the commencement of each Rental Period shall not be less than 75% of the average total percentage rents paid during the last three accounting years of the previous Rental Period; (ii) the percentage rental rates shall not be less than the percentage rental rates most recently adopted by Lessor's Board of Port Commissioners; and, (iii) the agreed-to Minimum Annual Rent shall be further adjusted in accordance with Paragraph 3.1 herein.
- (b) In the event the parties cannot agree to the rent for a Rental Period, the rent for said Rental Period shall be determined by three arbitrators in accordance with Sections 1280 through 1294.2 of the California Code of Civil Procedure.

The parties agree that, after notice by either party to the other requesting arbitration, each party shall appoint one arbitrator within thirty (30) days. Notice of the appointment shall be given by each party to the other party when made. Should either party fail to appoint its arbitrator within said time period, then the party that has appointed its arbitrator may petition the Superior Court of the state of California, county of San Diego, to appoint the second arbitrator. The party making the application shall give the other party notice of its application. All costs, including attorney fees associated with the court's appointment of the second arbitrator, shall be borne by the party which failed to appoint its arbitrator.

The two arbitrators shall immediately choose a third arbitrator to act with them. If they fail to select a third arbitrator within thirty (30) days following the appointment of the second arbitrator, on application by either party, the third arbitrator shall be promptly appointed by the then-presiding judge of the Superior Court of the state of California, county of San Diego, acting in his/her individual capacity. The party making the application shall give the other party notice of its application. All of the arbitrators shall be qualified real estate appraisers that are licensed to practice in the state of California.

By no later than thirty (30) days following the appointment of the third arbitrator, Lessor and Lessee shall each provide the other and each of the three arbitrators with (i) its rent proposal which shall consist of the Minimum Annual Rent and the percentage rental rates (and/or gallonage and/or flat rents if applicable) for the pending Rental Period under arbitration (the "Rent

Proposal") and (ii) its appraisal report prepared by a qualified real estate appraiser licensed to practice in the state of California. In Lessor's and Lessee's Rent Proposal, the Minimum Annual Rent shall not be less than 75% of the average total percentage rent due during the last three accounting years of the immediately preceding Rental Period, and the percentage rental rates shall not be less than the percentage rental rates most recently adopted by Lessor's Board of Port Commissioners. In the event the Rent Proposal and the opinion of fair market rent expressed in the appraisal report differ, the Rent Proposal shall control. The appraisal reports shall consider: (1) the Leased Premises as if vacant of Lessee-owned improvements and available for new construction but with street access, utility services, and shoreline protection (if the Leased Premises are located on the waterfront) regardless of who paid for the installation of the street improvements, utility services and/or shoreline protection; (2) the Leased Premises as having all regulatory entitlements and development rights for the types of uses permitted in Paragraph 2 above which includes, but is not restricted to, the design, construction and size of the existing improvements; (3) the highest and best use of the Leased Premises as if available for new leasing purposes under optimal development assumptions that are consistent with the uses provided in Paragraph 2 herein and to the other terms, conditions and restrictions of the Lease; (4) as if held by a private party in fee simple with all of the rights to sell, lease or transfer the owner's interest, and shall disregard any limitation resulting from public ownership; and (5) as if offered for lease in the open market. No diminution in value shall be taken as a result of any existing Hazardous Materials, as herein described, or improvements, or lack of improvements, on the Leased Premises. The appraisers shall use and analyze only the market data that is found in the marketplace, such as is demanded and received by other lessors for the same or similar types of uses allowed on the Leased Premises. In all cases, the appraisal reports shall be based upon recognized real estate appraisal principles and methods.

Within thirty (30) days following the selection of the third arbitrator, the three arbitrators shall conduct an arbitration hearing in the city of San Diego, California. The three arbitrators shall hear and consider the testimony of the Lessor and Lessee and their appraisal witnesses and any additional written information furnished by Lessor or Lessee. The amount and kind of evidence allowed and the rules of discovery and testimony shall be decided solely by the third arbitrator after consultation with the arbitrators appointed by the Lessor and Lessee.

The award determined by the arbitrators shall be effective and retroactive to the first day of the Rental Period under arbitration. The award shall be in writing and shall be made no later than fifteen (15) days following the arbitration hearing. The award shall be either Lessor's Rent Proposal or

Lessee's Rent Proposal. The arbitrators shall not possess any right or authority to propose a compromise between Lessor's Rent Proposal and Lessee's Rent Proposal or the modification of either Rent Proposal. The arbitrators shall select whichever of the two Rent Proposals sets forth the rent that the majority of the arbitrators believe is closest to the market rent for the Leased Premises for the Rental Period under arbitration. A unanimous decision of the three arbitrators is not required. Within ten (10) days of the date the award is made, the underpayment of the rent, if any, shall be paid by Lessee to Lessor, with interest at the rate of ten percent (10%) per annum from the commencement of the rental period under arbitration, until paid. Any overpayment of the rent, if any, shall be credited to the next payment of rent owed by Lessee under this Lease following the award.

- (c) Lessor and Lessee shall each pay for its own attorney's fees, transcriptions, and the cost of its appointed arbitrator. Lessor and Lessee shall equally share the third arbitrator's fee and expenses and the cost of the hearing including, but not limited to, cost for using the facilities at which the hearing is conducted and the cost of the recorder of the testimony.

#### 4. IMPROVEMENTS:

- (a) In accordance with the procedures described herein, Lessee may, at its own expense, make alterations or changes, or cause to be made, built, installed, or removed any structures, machines, appliances, utilities, signs, or other improvements necessary or desirable for the authorized use of the Leased Premises. Provided, however, said work shall be in accordance with plans and specifications, including but not limited to working drawings, hereinafter "Plans," previously submitted to and approved in writing by Lessor.
- (b) No construction, installation, or removal of any improvement upon the Leased Premises shall commence without Lessor's prior written approval. All construction, installations, and removals shall be in accordance with Plans submitted to and approved in writing by Lessor prior to the commencement of any such work. All Plans are subject to changes as may be approved by Lessor, in Lessor's sole discretion. Further, all work shall be in accordance with all applicable laws, regulations, ordinances, and codes.
- (c) Notwithstanding the foregoing, within the interior of any enclosed building structure, and without Lessor's prior consent, Lessee shall have the right to install and/or remove machines, equipment, appliances, and trade fixtures that are necessary or desirable for the authorized use of the Leased Premises.

- (d) When required by Lessor, Lessee shall, at its sole cost and expense, pave or landscape the entire portion of the Leased Premises not covered by structures. All paving and/or landscaping shall be in compliance with Lessor's "South Embarcadero Urban Design + Signage Guidelines" as it now exists or, as it may be amended in the future, and in accordance with Plans which must be submitted to and approved in writing by Lessor prior to the commencement of any such paving and/or landscaping and shall be in compliance with all governmental stormwater laws and regulations.
- (e) Lessee shall notify Lessor prior to submitting application(s) to any governmental regulatory agency for any development or construction permit or license pertaining to the Leased Premises. Lessee shall also provide Lessor with a copy of all application(s) within five (5) days of making said application(s), along with copies of all Plans submitted as part of the application(s). Lessee shall also provide Lessor, within ten (10) days of Lessee's receipt, a copy of all permits, licenses, or other authorizations subsequently issued.
- (f) Lessee agrees that no banners, pennants, flags, spinners, or other advertising devices, nor any temporary signs, shall be flown, installed, placed, or erected on the Leased Premises without Lessor's prior written consent.

5. **CONSTRUCTION OF IMPROVEMENTS:** This section was intentionally omitted.

6. **TITLE TO IMPROVEMENTS:** For the purposes of this Paragraph, "improvements" shall include, but are not limited to subsurface improvements. On the Commencement Date of this Lease, all existing structures, buildings, installations and improvements of any kind located on the Leased Premises are owned by and title thereto is vested in Lessor. All said existing structures, buildings, installations and improvements as well as structures, buildings, installations and improvements as well as structures, buildings, installations and improvements of any kind placed on the Leased Premises by Lessee subsequent to the Commencement Date of this Lease shall, at the option of Lessor, be removed by Lessee at Lessee's expense. Lessor may exercise said option as to any or all of the structures, buildings, installations and improvements either before or after the Termination Date or sooner termination of this Lease. If Lessor exercises such option, Lessee shall remove such structures, buildings, installations or improvements within (60) days after the Termination Date of this Lease or sooner termination thereof, whichever occurs earlier. Provided however, Lessee agrees to repair any and all damage occasioned by their removal. Title to any such structures, buildings, installations, and/or improvements not so removed within said sixty (60) days shall vest in the Lessor, without cost to Lessor and without any payment to Lessee, except that Lessor shall have the right to have them removed and to repair any and all damage occasioned by their removal, all at the expense of Lessee.

On the Commencement Date of this Lease, all existing machines, appliances, equipment, trade fixtures, and portable public artworks (i.e., artworks that are not architecturally affixed to the structures and buildings and are capable of being removed and transported to another location without the art or the Leased Premises being damaged) located on the Leased Premises are owned by and title thereto is vested in Lessee. Furthermore, all machines, appliances, equipment, trade fixtures, and portable public artworks placed on the Leased Premises by Lessee subsequent to the Commencement Date of this Lease are owned by and title thereto is vested in Lessee. All machines, appliances, equipment, trade fixtures, and portable public artworks shall be removed by Lessee within sixty (60) days after the Termination Date of this Lease or sooner termination thereof, whichever occurs earlier. Provided, however, Lessee agrees to repair any and all damage occasioned by their removal.

Notwithstanding the foregoing, any machines, appliances, equipment, trade fixtures and those portable public artworks placed on the Leased Premises by Lessee to fulfill a public art requirement pursuant to the then-current public art policy of the Board of Port Commissioners or which are located on the leased Premises on the Commencement Date of this Lease may only be removed by Lessee, at Lessor's option. If machines, appliances, equipment, trade fixtures, and public artworks required by Lessor to be removed by Lessee within sixty (60) days after the Termination Date of this Lease or sooner termination thereof, whichever occurs earlier, the same may be considered abandoned and shall thereupon become the property of Lessor, without cost to the Lessor and without any payment to Lessee, except that Lessor shall have the right to have them removed and to repair any and all damage occasioned by their removal, all at the expense of Lessee.

During any period of time employed by Lessee under this Paragraph to remove structures, buildings, installations, improvements, machines, appliances, equipment trade fixtures, and public artworks, Lessee shall continue to pay the full rent to Lessor in accordance with this Lease, which said rent shall be prorated daily.

7. **LIENS:** Lessee shall defend, indemnify and hold harmless Lessor against all claims and liens for labor, services, or materials in connection with improvements, repairs, or alterations on the Leased Premises, and the costs of defending against such claims and liens, including reasonable attorney's fees.

In the event that any such claim or lien, or any other claim(s), lien(a) or levy(ies) whatsoever of any nature caused by Lessee or Lessee's sublessees, contractors, and agents, is filed against the Leased Premises or the leasehold interests of the Lessee therein, Lessee shall, upon written request of Lessor, deposit with Lessor a bond conditioned for the payment in full of all claims upon which said lien(s) or levy(ies) have been filed.

Such bond shall be acknowledged by Lessee, as principal, and by an entity licensed by the Insurance Commissioner of the state of California to transact the business of a fidelity and surety insurance company, as surety. Lessor shall have the right to declare this Lease in



default in the event the bond required by this paragraph has not been deposited with the Lessor within ten (10) days after written request has been delivered to Lessee.

This provision shall not apply to a foreclosure of a trust deed or mortgage encumbering the leasehold if the encumbrance has previously received Lessor's consent in accordance with Paragraph 8 herein.

**8. LEASE ENCUMBRANCE:**

- (a) **No Application to SDCCC Deed of Trust.** Lessee understands and acknowledges that the provisions of Paragraph 8 shall not apply to the SDCCC Deed of Trust. For the avoidance of doubt, Lessee further acknowledges that FIFTH AVENUE LANDING, LLC, as the beneficiary under the SDCCC Deed of Trust, is not and shall not have the rights of, a Consented-to-Lender under this Paragraph 8. The rights and obligations of FIFTH AVENUE LANDING, LLC as the beneficiary under the SDCCC Deed of Trust will be governed by Paragraph 8(h) of this Lease.
- (b) **Lessor's Consent to Encumbrance.** Lessee shall not encumber the Lease, leasehold interest, and the improvements thereon by a deed of trust, mortgage, or other security instrument to assure the payment of any Lessee obligation, without Lessor's prior written consent, in each instance. If Lessee enters into any deed of trust, mortgage, or other security instrument that encumbers the Lease, leasehold interest, or the improvements thereon without Lessor's prior written consent, Lessor shall have the right to declare this Lease in default.

In the event Lessee requests Lessor's consent to any Lease encumbrance, hereinafter referred to as a "transaction" in this Paragraph 8, Lessee shall reimburse Lessor for all Lessor's reasonable costs and expenses associated with said transaction. Said costs shall include reasonable legal fees and disbursements relating to or arising out of any such transaction, regardless of whether such transaction is consummated.

In the event Lessor consents to any Lease encumbrance, said consent shall be conditioned upon the following: (i) if, on the effective date of such proposed encumbrance, the rent being paid under this Lease is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent; (ii) if deemed necessary by Lessor, a Lease amendment shall be executed which will include new or revised lease provisions, (iii) the maximum loan proceeds shall not be in excess of the greater of 75% loan-to-value as determined by lender's appraisal, or the amount of repayment of existing financing that encumbers the leasehold, (iv) the loan shall have an amortization term that is less than the remaining term of the ground lease, and (v) the Lessee shall acknowledge in writing that it will not seek rent relief as a result of not being able to meet its debt repayment obligations. Upon the

effective date of any said consented-to-encumbrance, Lessee shall thereafter pay to Lessor the market rent as referenced herein, subject to adjustments and rent reviews as provided in Paragraphs 3.1 and 3.2 herein

In the event of a consented-to-encumbrance, if the parties cannot agree to an amount that is equal to the market rent, the rent shall be determined by the procedure described in Paragraph 3.2 herein, except that the award shall be effective and retroactive to the effective date of the consented-to-encumbrance.

- (c) **Definition of "Consented-to-Lender".** The term "Consented-to-Lender" as hereinafter used in this Lease, means the lender holding an encumbrance consented to by Lessor. It may include one or more lenders holding obligations of the Lessee secured by a single deed of trust, mortgage, or other security instrument.
- (d) **Voluntary Lease Surrender.** Without the prior written consent of the Consented-to-Lender, should Lessee owe the Consented-to-Lender any amounts under any security instrument encumbering this Lease, leasehold interest, or the improvements thereon, Lessor will not accept the voluntary surrender, cancellation, or termination of this Lease before the expiration of the term thereof.
- (e) **Loan Default.** If a deed of trust, mortgage, or other security instrument consented to by Lessor is in default at any time, the Consented-to-Lender shall, as provided by law, have the right, without Lessor's prior consent, to:
  - (1) Accept an assignment of the Lease in lieu of foreclosure; or
  - (2) Cause a foreclosure sale to be held pursuant to either judicial proceedings or power of sale as provided in its deed of trust, mortgage, or other security instrument.

Provided, however, with the exception of said Consented-to-Lender, no assignment to the successful bidder shall be effective without Lessor's prior written consent.

- (f) **Assume Lease Obligations.** Before said Consented-to-Lender, or any other future consented-to assignee, acquires the leasehold interest, it shall, as an express condition precedent, agree in writing to assume each and every obligation under the Lease. Furthermore, before any said Consented-to-Lender, or any other future consented-to assignee or purchaser, may subsequently assign or sublease all or any portion of the leasehold interest, it shall, in each instance, obtain Lessor's prior written consent.

Further, a Consented-to-Lender that has: (i) acquired the leasehold interest and assumed the Lessee's obligations, or (ii) entered into a new lease pursuant to Paragraph 10 herein, concurrently with a termination of this Lease, shall be released from all further obligations under this Lease after it assigns the leasehold interest to an assignee consented to by Lessor, in accordance with this Paragraph 8.

(g) **Lessor's Consent to Assignment.** Whenever a Consented-to-Lender is required by the provisions of this Paragraph 8 to obtain Lessor's prior consent to an:

- (1) Assignment to the successful bidder upon a foreclosure by said Consented-to-Lender; or
- (2) Assignment or sublease of all or substantially all of the Leased Premises by said Consented-to-Lender should it become the lessee by reason of: (i) being the successful bidder upon said foreclosure, or (ii) an assignment in lieu of foreclosure, or (iii) under a new lease entered into pursuant to Paragraph 10 herein; then Lessor will grant such consent if:
  - (i) The principal(s) of such assignee, purchaser, or sublessee are reputable (meaning the absence of reputations for dishonesty, criminal conduct, or association with criminal elements -- "reputable" does not mean "prestigious," nor does the determination of whether one is reputable involve considerations of personal taste or preference);
  - (ii) The principal(s) of such assignee, purchaser, or sublessee possess sufficient business experience and financial means to perform Lessee's obligations under this Lease--according to the then-current standards for business experience and financial means that Lessor generally requires of new or renewed lessees at the time of the request; and
  - (iii) The assignee, purchaser, or sublessee agrees in writing to assume each and every obligation under this Lease.

Further, Lessor will not unreasonably or arbitrarily withhold such consent. Provided, however, no such assignee, purchaser, or sublessee shall subsequently: (i) assign, transfer, or sublease any or all of the Leased Premises without Lessor's prior written consent, in accordance with Paragraph 9 herein; or (ii) encumber the Lease, leasehold interest, and

improvements thereon without Lessor's prior written consent, in accordance with this Paragraph 8.

Provided further, if said Consented-to-Lender becomes the lessee by reason of: (i) being the successful bidder upon foreclosure, or (ii) an assignment in lieu of foreclosure, or (iii) being the lessee of a new lease entered into pursuant to Paragraph 10 herein, then said Consented-to-Lender may, upon a subsequent assignment or subleasing of all or substantially all of the Leased Premises, take back from its assignee, purchaser, or sublessee, a purchase money deed of trust, mortgage, or security instrument. Provided, however, said Consented-to-Lender must execute and submit to Lessor documentation substantially in the same form and content as was originally submitted to Lessor when consent was granted to the earlier encumbrance. Only said Consented-to-Lender or the successful bidder upon said foreclosure may enforce the provisions of this Paragraph 8. Further, no other third party shall have the rights or remedies, as third-party beneficiaries, or otherwise, hereunder.

The burden of producing evidence and the burden of proof showing Lessor that a prospective assignee, purchaser, or sublessee meets each and all of the aforesaid qualifications and standards shall be on said Consented-to-Lender or successful bidder upon foreclosure. Lessor's decision shall be based upon Lessor's high duty of care in administering a valuable public resource, which it holds in trust for the people of the state of California. In the absence of fraud or arbitrary or unreasonable action in applying or failing to apply said standards, Lessor's decision shall be final.

- (h) If Lessor Rejects Lease Transferee. In the event Lessor rejects: (i) the successful bidder upon foreclosure, or (ii) a proposed assignee or sublessee of the Consented-to-Lender (said successful bidder or Consented-to-Lender being sometimes referred to hereinafter as the "Aggrieved Party," and said successful bidder, or proposed assignee or sublessee from the Consented-to-Lender being sometimes referred to hereinafter as the "Applicant"), the sole remedy of the Aggrieved Party shall be to seek relief in the nature of specific performance through the arbitration procedure hereinafter established. Further, in no event shall Lessor be liable to the Aggrieved Party or Applicant, or any person or entity whatsoever, for money damages. Provided, however, the Aggrieved Party shall be entitled to recover such damages, if any, it may sustain as a result of Lessor's failure or refusal to comply with a Superior Court order confirming an award in favor of the Aggrieved Party in said arbitration.

The issue to be submitted to arbitration shall be whether Lessor's Board of Port Commissioners' record contains substantial evidence to support the

decision to reject the Applicant in accordance with the standards of reputation, business experience, and/or financial means, as provided herein. The Aggrieved Party may submit said issue to arbitration.

The arbitration shall be conducted pursuant to Title 9 of Part 3 of the California Code of Civil Procedure (section references herein shall be to the Code of Civil Procedure), as amplified and modified by the following provisions:

- (1) Arbitration shall be initiated by the Aggrieved Party filing a written demand for arbitration with Lessor no later than thirty (30) days following Lessor's adoption of a resolution rejecting the Applicant. If the Aggrieved Party so elects, Lessor shall be deemed to have adopted a resolution rejecting an Applicant if Lessor has not acted within ninety (90) days after the Aggrieved Party files a written application for Lessor to approve the Applicant;
- (2) Said arbitration shall be conducted by a single neutral arbitrator who shall not be a County of San Diego resident;
- (3) If the parties have not agreed on the selection of the arbitrator within five (5) days after said demand for arbitration is filed, either party may petition the Superior Court of the state of California, county of San Diego, to select the arbitrator pursuant to Section 1281.6;
- (4) Each party shall submit its nominees, if any, to the court within five (5) days after said petition is served and filed;
- (5) Said arbitrator shall not conduct a trial de novo, but shall consider only said record before Lessor's Board of Port Commissioners. Provided, however, said arbitrator may consider evidence outside said record if the arbitrator believes that the Board's decision was affected by Lessor's fraudulent action which was not reasonably discoverable prior to the Board's decision;
- (6) Said arbitrator shall make the award in writing within forty-five (45) days of being appointed;
- (7) The right of any party to take depositions for discovery purposes, as provided in Section 1283.05, shall be waived;
- (8) Certain time periods established in said Title 9 shall be shortened as follows:

- (i) Sections 1284, 1288.4, 1290.2, and 1290.6--halved;
  - (ii) Section 1288--four years to 30 days and 100 days to 15 days; and
  - (iii) Section 1288.2--100 days to 15 days;
- (9) San Diego, California shall be the venue of the arbitration hearing and any court proceedings;
- (10) The decision of the Superior Court in any proceeding to confirm, correct, or vacate the award shall be final, and the parties to said arbitration waive any rights to appeal therefrom, as provided in Sections 1294 and 1294.2, or otherwise; and
- (11) The parties shall bear their costs, fees, and expenses incurred in connection with said arbitration, in accordance with the provisions of Section 1284.2.
- (l) Notice of Foreclosure Sale. Said Consented-to-Lender shall include a statement in any Notice of Foreclosure Sale covering the foregoing requirements for Lessor's consent to an assignment upon said foreclosure.
- (j) Subsequent Encumbrance. Except for subleases, utility easements, and other necessary rights-of-way, Lessor shall not expressly consent to a subsequent lien or encumbrance against the Leased Premises without said Consented-to-Lender's prior written consent.
- (k) Assignment of Security Interest. Said Consented-to-Lender shall not assign its security interest in the Leased Premises in whole or in part without Lessor's prior written consent, in each instance. Provided, however, Lessor's consent to such an assignment shall be deemed granted (and such assignee will for all purposes of this Lease be deemed to be a Consented-to-Lender) if the assignment is to:
  - (1) A financial institution in good legal standing under the laws of its jurisdiction of incorporation having assets exceeding Five Hundred Million Dollars (\$500,000,000); or
  - (2) The United States of America or any state thereof, or any agency thereof; or

- (3) An assignee by operation of law; e.g., a state insurance department engaged in supervising the liquidation or rehabilitation of an insurance company lender.

Provided, however, for purposes of the foregoing provisions "financial institution" shall mean: (i) an insurance company qualified to do business in the state of California; or (ii) a federally- or state-chartered bank, savings bank, or savings and loan association; or (iii) a pension or retirement fund operated for the employees and former employees of, and regulated and controlled by, the United States of America or any state thereof, or any agency thereof; e.g., the California State Teachers' Retirement System.

Provided, further, no subsequent assignment by such assignee will be permitted unless:

- (4) The assignment conforms to all requirements of this Paragraph 8;
- (5) A duplicate original(s) of such assignment is furnished Lessor; and
- (6) In case of an assignment where Lessor's consent is deemed granted: (i) assignee promptly furnishes Lessor reasonably satisfactory evidence that said assignee complies with the foregoing requirements, and (ii) said assignee expressly agrees to take such assignment subject to all Lessor's rights under this Lease.

9. **ASSIGNMENT – SUBLEASE:** With the exception of an assignment to the City of San Diego or an entity owned and controlled by the City of San Diego with respect to the Expansion Option as defined in Paragraph 49 (in the context of a Lease assignment or transfer, the City or such owned and controlled entity shall be called a "Permitted Assignee"), Lessee shall not, without the prior written consent of Lessor:

- (a) Assign or transfer the whole or any part of this Lease or any interest therein;
- (b) Sublease (which shall also include management and/or operating agreements covering the Leased Premises) the whole or any part of the Leased Premises;
- (c) Permit transfer of the Lease or possession of the Leased Premises by merger, consolidation, or dissolution of Lessee;
- (d) Notwithstanding the provisions contained in Paragraph 8 herein, permit hypothecation, pledge, encumbrance, transfer or sale, voluntary or involuntary, in whole or in part, of this Lease or any interest therein; or

- (e) Permit the occupancy of the whole or any part of the Leased Premises by any other person or entity; or
- (f) Permit the transfer or sale, voluntary or involuntary, of the entire corporation to a third party other than Lessee's parent company, including subsidiaries or affiliates; or
- (g) Contract for the management or operation of the whole or any part of the Leased Premises.

In the event Lessee requests Lessor's consent to any Lease assignment, Lease transfer, Lease amendment, and/or sublease, hereinafter referred to as a "transaction," Lessee shall reimburse Lessor for all Lessor's reasonable costs and expenses associated with said transaction. Said costs shall include reasonable legal fees and disbursements relating to or arising out of any such transaction, regardless of whether such transaction is consummated.

- (h) Special Provisions Regarding SDCCC Deed of Trust. The following special provisions will govern foreclosures and other transfers under the SDCCC Deed of Trust. Following any transfer of this Lease to FIFTH AVENUE LANDING, LLC in accordance with this Paragraph 8(h), this Paragraph 8(h) shall terminate and shall be of no further force or effect.

- (1) Voluntary Lease Surrender. Except as provided in Paragraph 49 regarding termination of this Lease as to all or a portion of the Leased Premises prior to the expiration of the term of this Lease, without the prior written consent of FIFTH AVENUE LANDING, LLC, should Lessee owe FIFTH AVENUE LANDING, LLC any amounts secured by the SDCCC Deed of Trust, Lessor shall not accept the voluntary surrender, cancellation, or termination of this Lease before the expiration of the term hereof.

- (2) Loan Default. FIFTH AVENUE LANDING, LLC shall, as provided by law, have the right, without Lessor's prior consent, to:

- a. Accept an assignment of the Lease in lieu of foreclosure of the SDCCC Deed of Trust; or
- b. Cause a foreclosure sale to be held pursuant to either judicial proceedings or power of sale as provided in the SDCCC Deed of Trust provided, however, with the exception of an assignment to FIFTH AVENUE LANDING, LLC as a result of such foreclosure, no assignment to the successful bidder shall be effective without Lessor's prior written consent, which will be granted or denied in accordance with the standards and procedures set forth in Paragraphs 8(g) and 8(h).



- (3) Assume Lease Obligations. Before FIFTH AVENUE LANDING, LLC acquires the leasehold interest, by way of foreclosure, deed-in-lieu of foreclosure, or any other form of transfer of assignment involving FIFTH AVENUE LANDING, LLC taking possession or control of the Premises it shall, as an express condition precedent, provided that FIFTH AVENUE LANDING, LLC is a tenant in good standing under Lessor's current leasing policy, agree in writing to assume each and every obligation under the Lease. Furthermore, before FIFTH AVENUE LANDING, LLC, may subsequently assign or sublease all or any portion of the leasehold interest, it shall, in each instance, obtain Lessor's prior written consent. As a further condition to any such transfer of the Lease to FIFTH AVENUE LANDING, LLC, Lessor may require, in its sole and absolute discretion, that the individual principals of FIFTH AVENUE LANDING, LLC execute a personal guaranty of all Lease obligations hereunder.

Notwithstanding the foregoing, nothing herein shall be construed to prevent the occupancy of said Leased Premises by any employee or business invitee of Lessee.

If Lessee assigns this Lease to a Permitted Assignee, or if Lessor consents to any Lease assignment or transfer, completion of such assignment or transfer shall be conditioned upon the following: (i) If, on the effective date of such proposed assignment or transfer, the rent being paid under this Lease is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent; (ii) assignee shall agree and assume each and every obligation under the Lease; (iii) if deemed necessary by Lessor, a Lease amendment shall be executed which will include new or revised lease provisions; and (iv) assignee shall comply with other conditions and qualifications determined by the Board of Port Commissioners of Lessor. Notwithstanding, items (i), (ii), and (iv) shall not apply in the event of: (a) a Lease assignment or transfer to a third party from a Consented-to-Lender which acquired title to the Lease by foreclosure or deed in lieu of foreclosure or a new Lease pursuant to the provisions of Paragraph 10 herein, or (b) assignment or transfer of the Lease to a Consented-to-Lender by deed in lieu of foreclosure, or to a Consented-to-Lender or a third party as the successful bidder at a foreclosure sale. Upon the effective date of any said consented-to Lease assignment or transfer, assignee shall thereafter pay to Lessor the market rent as referenced herein, subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein.

In the event Lessor consents to any sublease, said consent shall be conditioned upon the following: (i) If, upon the effective date of any said consented-to sublease, the rent being paid for the sublease area is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent for the sublease area as long as said sublease is in effect; (ii) if deemed necessary by Lessor, a Lease amendment shall be executed which shall include new or revised lease provisions; and (iii) Lessee shall comply with other conditions and qualifications determined by the Board of Port Commissioners of Lessor. Furthermore, as long as said sublease is in effect, rent for the sublease area shall be subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein.

For purposes of this Paragraph, the term sublease shall not include the rental of boat slips, dock lockers, dinghy racks, or dry storage spaces.

In the event of a consented-to assignment or sublease, if the parties cannot agree to an amount that is equal to the market rent, the rent shall be determined by the arbitration procedure described in Paragraph 3 herein, except that the award shall be effective and retroactive to the effective date of the assignment or sublease. Because of this provision, underpayment of rent, if any, shall be paid to Lessor within ten (10) days of the date that the market rent is determined by said arbitration procedure.

#### **10. DEFAULTS AND REMEDIES**

(a) **Defaults.** The occurrence of any one (1) or more of the following events shall constitute a default hereunder:

- (1) **Abandonment of the Leased Premises.** Abandonment is herein defined to include, but is not limited to, any absence by Lessee from the Leased Premises for ten (10) consecutive days or longer.
- (2) **Failure by Lessee to pay, when due, any Lease-required rent, other payment, and/or charge herein, where such failure continues for a period of ten (10) days after written notice thereof. Provided, however, any such notice provided in this Paragraph 10(a)(2) or in subsequent Paragraph 10(a)(3) shall be in lieu of, and not in addition to, any notice required under Section 1161 of the California Code of Civil Procedure, as amended.**
- (3) **Failure by Lessee to perform any other express or implied covenants or conditions in this Lease (other than any breach under Paragraph 9, for which immediate notice of termination may be given), should such failure continue for thirty (30) days after written notice thereof; provided that, if such default is not reasonably susceptible of cure within said thirty (30) day period and Lessee has commenced action within said thirty (30) day period to cure the default and is diligently pursuing action to completion, such time period shall be extended by the time necessary to cure such default and further provided, in no event shall such extension period to cure the default continue for a time period in excess of Three Hundred Sixty-Five (365) days.**
- (4) **Subject to any restrictions or limitations placed on Lessor by applicable laws governing bankruptcy, Lessee's: (a) applying for, consenting to, or suffering the appointment of a receiver, trustee, or liquidator for all or a substantial portion of its assets; (b) making a general assignment for the benefit of creditors; (c) admitting in writing**

its inability to pay its debts or its willingness to be adjudged a bankrupt; (d) becoming unable to, or failing to, pay its debts as they mature; (e) being adjudged a bankrupt; (f) filing a voluntary petition or suffering an involuntary petition under any bankruptcy, arrangement, reorganization, or insolvency law (unless in the case of an involuntary petition, the same is dismissed within thirty (30) days of such filing); (g) convening a meeting of its creditors, or any class thereof, for purposes of effecting a moratorium, extension, or composition of its debts; or (h) suffering, or permitting to continue unstayed and in effect for ten (10) consecutive days, any attachment, levy, execution, or seizure of all or a substantial portion of Lessee's assets or of Lessee's interest in this Lease.

This Paragraph 10(a)(4) shall not be applicable or binding on the beneficiary of any deed of trust, mortgage, or other security instrument on the Leased Premises which is of record with Lessor and has been consented to by resolution of Lessor, or to said beneficiary's successors in interest consented to by resolution of Lessor, as long as there remains any monies to be paid by Lessee to such beneficiary under the terms of such deed of trust; provided that such beneficiary or its successors in interest, continuously and timely pays to Lessor all rent due or coming due under the provisions of this Lease and the Leased Premises are continuously and actively used in accordance with Paragraph 14 of this Lease, and provided that said beneficiary agrees in writing to assume and perform each and every obligation under the Lease.

(5) Failure by Lessee to comply with all time periods specified in this Lease.

(6) Notwithstanding Paragraph 10(a)(5), failure by Lessee to timely comply with all other provisions of this Lease.

(b) Remedies. In the event of any default, Lessor may exercise the following remedies:

(1) Termination: Terminate Lessee's right to possession of the Leased Premises whereupon this Lease shall terminate and Lessee shall immediately surrender possession of the Leased Premises to Lessor. In such event, Lessor shall be entitled to recover from Lessee:

(i) The "Worth at the Time of Award", as hereinafter defined, of the unpaid rent which had been earned at the time of termination;

- (ii) The "Worth at the Time of Award" of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided;
- (iii) The "Worth at the Time of Award" of the amount by which the unpaid rent for the balance of the term of this Lease after the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided; and,
- (iv) Any other amount necessary to compensate Lessor for all the detriment proximately caused by Lessee's failure to perform its obligations under this Lease, or which would ordinarily be likely to result therefrom, including but not limited to the cost of recovering possession of the Leased Premises, expenses of reletting (including necessary repair, renovation and alteration of the Leased Premises), reasonable attorneys' fees, and any other reasonable costs.

The "Worth at the Time of Award" of the amounts referred to in Paragraphs 10(b)(1)(i) and 10(b)(1)(ii) shall be computed by charging interest at ten percent (10%) per annum from the dates such amounts accrued to Lessor. The "Worth at the Time of Award" of the amount referred to in Paragraph 10(b)(1)(iii) shall be computed by discounting such amount at one (1) percentage point above the Discount Rate of the Federal Reserve Bank of San Francisco at the time of the award.

- (2) **Reletting:** Without terminating or effecting a forfeiture of the Lease, or otherwise relieving Lessee of any obligation herein, Lessor may, but need not, relet the Leased Premises or any portion thereof, at any time or from time to time, for such terms and upon such conditions and rent as Lessor, in its sole discretion, deems proper. Regardless of whether the Leased Premises are relet, Lessee shall continue to pay to Lessor all Lease-required amounts up to the date that Lessor terminates Lessee's right to possession of the Leased Premises; provided, however, following a default, Lessor shall not unreasonably withhold its consent to any Lessee-requested assignment of this Lease or subletting of the Leased Premises, unless Lessor shall also elect to terminate this Lease and Lessee's right to possession of the Leased Premises, as provided in Paragraph 10(b)(1). Such payments shall be due at the times provided in this Lease and Lessor need not wait until the termination of the Lease to recover said amounts. If Lessor relets the Leased Premises, or any portion thereof, such reletting shall not relieve Lessee of any obligations herein, except that Lessor shall apply

the rent or other proceeds actually collected for such reletting against amounts due from Lessee herein, to the extent such proceeds compensate Lessor for Lessee's nonperformance of any obligation herein. Lessor may execute any lease made pursuant thereto in its own name. Further, Lessor shall be under no obligation to reveal to new lessee how these proceeds were applied, nor shall said new lessee have any right to collect any such proceeds. Lessor shall not, by any reentry or other act, be deemed to have accepted Lessee's surrender of the Leased Premises or Lessee's interest therein, nor be deemed to have terminated this Lease or to have relieved Lessee of any obligation herein, unless Lessor shall have furnished Lessee with express written notice of Lessor's election to do so, as set forth herein.

- (3) Other: Any and/or all other rights or remedies of Lessor specified elsewhere in this Lease or provided by law.

Lessor shall furnish copies of all notice(s) of default(s) to any Consented-to-Lender and to the beneficiary under the SDCCC Deed of Trust by certified mail (provided Lessee has delivered to Lessor written request, therefore, together with the name and address of any such beneficiary or mortgagee) contemporaneously with the furnishing of such notices to Lessee. Furthermore, in the event Lessee fails to cure such default(s) within the time permitted herein, said beneficiary or mortgagee shall be permitted to cure such default(s) at any time within fifteen (15) days following the expiration of the period within which Lessee may cure said default(s); provided, however, Lessor shall not be required to furnish any further notice(s) of default(s) to said beneficiary or mortgagee.

In the event this Lease is terminated pursuant to the provisions of this Paragraph 10, Lessor shall continue to have all rights provided in Paragraph 6 of this Lease.

Notwithstanding the foregoing, should a default not be cured within the cure periods referred to above, said Lease shall not be terminated as to said beneficiary or mortgagee unless Lessor first legally offers to enter into a valid lease with said beneficiary or mortgagee, and said offer is not accepted in writing within (30) days after said offer is made. Furthermore, such new lease must be entered into as a condition concurrent with such termination for the then-remaining term of this Lease. Furthermore, the new lease must contain the same terms, conditions, and priority as this Lease, provided the mortgagee or beneficiary promptly cures all then-existing defaults under this Lease when and to the extent it is able to cure them. Such new lease may be entered into even though possession of the Leased Premises has not been surrendered by the defaulting Lessee. In such event, unless legally restrained, Lessor shall promptly proceed to obtain possession of the Leased Premises and to deliver possession to said mortgagee or beneficiary as soon as the same is obtained. Should the mortgagee or beneficiary fail to accept said offer in writing within said thirty (30) day period, or, having so accepted said offer, should it fail promptly to cure

all existing defaults under this Lease when and to the extent it is able to cure them, then such termination shall also be effective as to said mortgagee or beneficiary.

**11. BANKRUPTCY:** Lessor shall have the right to declare this Lease in default if Lessee: (i) becomes insolvent; (ii) makes an assignment for the benefit of creditors; (iii) becomes the subject of a bankruptcy proceeding, reorganization arrangement, insolvency, receivership, liquidation, or dissolution proceeding; or in the event of any judicial sale of Lessee's leasehold interest.

The conditions of this Paragraph shall not be applicable or binding on: (1) Lessee; or (2) the beneficiary in any deed of trust, mortgage, or other security instrument encumbering the leasehold interest which Lessor has consented to in writing; or (3) the aforesaid beneficiary's successors in interest which Lessor has consented to in writing, as long as there remains any monies to be paid by Lessee to such beneficiary under the terms of such deed of trust; provided Lessee, such beneficiary, or such beneficiary's successors in interest, continuously pay to the Lessor all rent or coming due under the provisions of this Lease, and the Leased Premises are continuously and actively used in accordance with Paragraph 14 herein.

**12. EMINENT DOMAIN:** If any public authority takes the whole or a substantial part of the Leased Premises under the power of eminent domain, then the term of this Lease shall cease as to the part so taken, from the day the possession of that part is taken. Further, the rent shall be paid up to that day. Lessee shall then have the right either to: (i) cancel this Lease and declare the same null and void; or (ii) continue in possession of the remainder of the Leased Premises under the then-current Lease terms. Provided, however, the award shall be reduced in proportion to the value of the portion of the Leased Premises taken. All damages awarded for such taking shall belong to and be the property of Lessor whether such damages shall be awarded as compensation for diminution in value to the leasehold or to the fee of the Leased Premises. Provided, however, Lessor shall not be entitled to any award made for the taking of any of Lessee's installations or improvements on the Leased Premises.

**13. TERMINATION OF PRIOR AGREEMENT(S):** Any and all existing permits, leases or rental agreements between Lessor and Lessee for the Leased Premises which have not already expired or terminated, are hereby terminated on the effective date of this Lease. Any rights, duties, and obligations of the parties, if any, pursuant to the terms, covenants, and conditions in any such hereby terminated agreements shall remain enforceable and subject to all defenses, including without limitation any applicable statute of limitations. Further, said statute shall not be waived or extended because of this Lease. Nothing herein is intended nor shall be construed as a waiver of any such rights, or as a release of any such duties or obligations, whether known or unknown at this time or upon the effective date of this Lease.

14. **USE OBLIGATION:** Lessee shall actively and continuously use and operate the Leased Premises for the limited particular exclusive use expressly provided for in Paragraph 2, herein, except for failure to so use caused by wars, strikes, riots, civil commotion, acts of public enemies, and acts of God. Said active and continuous use and operation enhances the value of the lands within Lessor's jurisdiction; provides needed public service; provides additional employment, taxes, and other benefits to the general economy of the area. Lessee, however, shall not and is expressly prohibited from using the Leased Premises for any other purpose or use whatsoever, whether it is purported to be in addition to or in lieu of the particular exclusive use expressly provided in Paragraph 2, herein.

15. **MAINTENANCE AND REPAIR:** As part of the consideration for this Lease, Lessee shall assume full responsibility for operation and maintenance throughout the term and without expense to Lessor. Lessee shall perform all maintenance, which includes all painting, repairs, and replacements necessary to maintain and preserve the Leased Premises in a good, safe, healthy, and sanitary condition, satisfactory to Lessor and in compliance with all applicable laws, and consistent with or superior to the standard of maintenance in Lessee's industry or industries according to the uses allowed on the premises. Provided, however, prior to Lessee performing any extraordinary repairs, plans and specifications must first be submitted to Lessor and receive Lessor approval, pursuant to the procedures provided in Paragraph 4 herein. Further, Lessee shall provide approved containers for trash and garbage and to keep the Leased Premises free and clear of rubbish, litter, or any other fire hazards. Lessee waives all right to make repairs at the expense of Lessor, as provided in Section 1942 of the California Civil Code, and all rights provided by Section 1941 of said code.

Lessee shall, at all times during the term of this Lease, keep or cause to be kept, accurate and complete records of maintenance conducted on the Leased Premises. The records must be supported by source documents of original entry such as invoices, receipts, work orders, or other pertinent supporting documents. All Lessee's maintenance records related to business operations conducted within or from the Leased Premises, shall be kept either at the Leased Premises or at such other locations as are acceptable to Lessor. Lessor shall have the right at any and all reasonable times to examine said maintenance records, without restriction, for the purpose of determining Lessee's compliance with the maintenance obligations under this Lease.

For the purpose of keeping the Leased Premises in a good, safe, healthy, and sanitary condition, Lessor always shall have the right but not the duty to enter, view, inspect, determine the condition of, conduct maintenance in the event of Lessee's failure to maintain, and protect its interests in the Leased Premises. Provided, however, Lessor or its representatives shall: (a) conduct such entry in a manner that causes the least inconvenience and disruption to Lessee's operation as practicable; and (b) comply with all safety and security requirements of Lessee. It is not intended, however, that Lessee's safety and security requirements be used to bar Lessor's right of inspection. Further, upon

written notice Lessee shall provide Lessor reasonable access to the Leased Premises for such purpose.

If inspection discloses the Leased Premises are not in the condition required herein, Lessee immediately must commence the necessary maintenance work, within ten (10) calendar days after written notice from Lessor and diligently pursue said work to completion.

Should Lessee fail to commence the necessary maintenance work within ten (10) calendar days at Lessor's request, Lessor shall have the right to enter the premises and complete said work. Lessor may perform all maintenance, which includes all repairs and replacements necessary to maintain and preserve the Leased Premises in a good, safe, healthy, and sanitary condition, satisfactory to Lessor and in compliance with all applicable laws. Lessor may also complete extraordinary repairs in accordance with Lessor's then applicable policies and procedures.

For any and all repairs undertaken by Lessor in accordance with this Paragraph, and upon written demand, Lessee shall reimburse or pay in advance to Lessor all costs associated with said repairs including, but not limited to, cost of materials and labor at Lessor's actual cost. Said payments shall be paid to Lessor as additional rent due under this Lease, subject to the rent provisions of this Lease, and paid in monthly installments or in one lump sum at the sole discretion of Lessor. For all repairs undertaken by Lessor pursuant to this Paragraph, Lessee shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless Lessor and its officers, employees, and agents pursuant to Paragraph 21 of this Lease. Further, if at any time Lessor determines the Leased Premises are not in the condition required herein, Lessor may require Lessee to file and pay for a faithful performance bond to assure prompt correction, without additional notice. The amount of said bond shall be adequate, in Lessor's opinion, to correct all unsatisfactory conditions.

Notwithstanding, Lessor shall not be required to perform any maintenance, including painting, repairs, or replacements; or to make any improvements whatsoever on or for the benefit of the Leased Premises.

The rights reserved in this Paragraph shall not create any obligations or increase any obligations for Lessor elsewhere in this Lease, nor shall the exercise therefore limit any and all other rights or remedies of Lessor specified elsewhere in this Lease or provided by law.

**16. PERFORMANCE BOND:** Lessee shall not commence any major construction upon the Leased Premises until performance bonds in the amount of the total estimated construction cost of the proposed improvements have been secured and submitted to Lessor. In lieu of said performance bonds, the Executive Director of Lessor may, in his sole discretion, accept performance and labor and material bonds supplied by Lessee's contractor or subcontractors, performance guarantees, or other satisfactory evidence that said construction will be timely completed. Said bonds must be in a form acceptable to



Lessor and have been issued by a company qualified to do business in the state of California.

**17. TAXES AND UTILITIES:** This Lease may result in a taxable possessory interest and be subject to the payment of property taxes. Lessee shall pay before delinquency all taxes and assessments of any kind assessed or levied upon Lessee or the Leased Premises by reason of: (i) this Lease; (ii) any buildings, machines, or other improvements of any nature whatsoever erected, installed, or maintained by Lessee; or (iii) the business or other activities of Lessee upon or in connection with the Leased Premises. Lessee also shall pay any fees imposed by law for licenses or permits for any business or activities of Lessee upon the Leased Premises, or under this Lease, and shall pay before delinquency any and all charges for utilities at or on the Leased Premises.

**18. CONFORMANCE WITH LAWS AND REGULATIONS:** Lessee agrees that, in all activities on or in connection with the Leased Premises, and in all uses thereof, including the making of any alterations, changes, installations, or other improvements, it will abide by and conform to all laws and regulations. Said laws and regulations shall include, but are not limited to those prescribed by the San Diego Unified Port District Act; any ordinances of the city in which the Leased Premises are located, including the Building Code thereof; and any ordinances and general rules of Lessor, including tariffs and any applicable laws of the state of California and federal government, as any of the same now exist or may hereafter be adopted or amended. In particular and without limitation, Lessee shall have the sole and exclusive obligation and responsibility to comply with the requirements of: (i) Article 10 of Lessor Code entitled "Stormwater Management and Discharge Control," and (ii) the Americans With Disabilities Act of 1990, including but not limited to regulations promulgated thereunder, and Lessor shall have no such obligations or responsibilities as to the Leased Premises.

**19. EQUAL EMPLOYMENT OPPORTUNITY AND NONDISCRIMINATION:** Lessee shall comply with Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1991; the California Constitution; the California Fair Employment and Housing Act; the Americans with Disabilities Act of 1990; and any other applicable federal, state, or local laws and regulations now existing or hereinafter enacted, requiring equal employment opportunities or prohibiting discrimination. This shall include without limitation, laws and regulations prohibiting discrimination because of race, color, religion, sex, national origin, ancestry, physical or mental disability, veteran status, medical condition, marital status, age, sexual orientation, pregnancy, or other non-job related criteria. In complying with all such laws, including without limitation the Americans with Disabilities Act of 1990, Lessee shall be solely responsible for such compliance and required programs, and there shall be no allocation of any such responsibility between Lessor and Lessee.

Annually, Lessee shall formulate and file with Lessor an approved: (i) "Equal Employment Opportunity and Nondiscrimination Program," and (ii) "Statement of Compliance" for the promotion of equal employment opportunities and nondiscrimination. Lessee shall make

such progress reports as required by Lessor, and, upon Lessor's reasonable notice, Lessee shall make available for inspection and copying all of its records relevant to compliance with this Paragraph. Provided, however, Lessee is only required to file the Program and Statement when the average annual employment level operating on the Leased Premises exceeds fifty (50) employees. Provided further, should Lessee be subject to a federally-mandated affirmative action program for employees, Lessee may, in lieu of filing the Program and Statement, annually certify in writing to Lessor that Lessee is subject to such a program, and, upon Lessor's request, Lessee shall furnish evidence thereof.

For the purposes and provisions of this Paragraph, a sublessee shall be considered the Lessee should the sublessee become the prime operator of the Leased Premises.

Lessee's compliance with this Paragraph is an express condition hereof, and any failure by Lessee to so comply and perform shall be a default as provided in this Lease, and Lessor may exercise any right as provided herein, and as otherwise provided by law.

**20. PARTIAL INVALIDITY:** If any term, covenant, condition, or provision of this Lease is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions herein shall remain in full force and effect, and shall in no way be affected, impaired, or invalidated thereby.

**21. HOLD HARMLESS:** Lessee shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless Lessor and its officers, employees, and agents for any and all liability, claims, judgments, damages, proceedings, orders, directives, costs, including reasonable attorneys' fees, or demands arising directly or indirectly out of the obligations undertaken in connection with this Lease, or Lessee's use, occupancy, possession or operation of the Leased Premises, except claims or litigation arising through the sole negligence or willful misconduct of Lessor. It is the intent of this Paragraph that Lessee indemnify and hold harmless Lessor for any actions of Lessee or Lessor, including duties that may be legally delegated to Lessee or to third parties, except for those arising out of the sole negligence or willful misconduct of Lessor. This indemnity obligation shall apply for the entire time that any third party can make a claim against or sue Lessor for liabilities arising out of Lessee's use, occupancy, possession or operation of the Leased Premises, or arising from any defect in any part of the Leased Premises.

**22. SUCCESSORS IN INTEREST:** Unless otherwise provided in this Lease, the terms, covenants, conditions, and agreements herein shall apply to and bind the heirs, successors, executors, administrators, and assigns of all the parties hereto, all of whom shall be jointly and severally liable hereunder.

**23. EASEMENTS:** This Lease and all rights granted hereunder are subject to all easements and rights-of-way previously granted or reserved by Lessor in, upon, over, and across the Leased Premises for any purpose whatsoever. Said Lease and granted rights shall be subject to future easements, rights-of-way for access, gas, electricity, water, sewer,

drainage, telephone, telegraph, television transmission, and such other Lessor or public facilities as Lessor may determine from time to time to be in the best interests of the development of the lands within Lessor's jurisdiction. Lessor agrees to make an effort to locate future easements and rights-of-way, and to install associated public facilities, so as to produce a minimum amount of interference with Lessee's business. Further, Lessee shall not be entitled to any monetary payment or other remuneration for any such future easements and rights-of-way.

**24. TITLE OF LESSOR:** Lessor's title is derived from the provisions of the San Diego Unified Port District Act, Appendix 1, Harbors & Navigation Code, and is subject to the provisions of said Act. This Lease is granted subject to the terms and conditions of said Act.

**25. INSURANCE:** Lessee shall maintain insurance acceptable to Lessor in full force and effect throughout the term of this Lease. The policies for said insurance shall, as a minimum, provide the following:

(a) Forms of Coverage

- (1) "OCCURRENCE" form Commercial General Liability covering the Leased Premises, operations, and contractual liability assumed by Lessee in this Lease in the amount of not less than Two Million Dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage. The general aggregate shall be Four Million Dollars (\$4,000,000) unless a Two Million Dollars (\$2,000,000) per location aggregate limit is provided separate by endorsement.

If alcoholic beverages are served or sold on the Leased Premises, Liquor Liability coverage in the amount of not less than Two Million Dollars (\$2,000,000) shall be obtained. If no alcoholic beverages are served or sold on the Leased Premises, the proof of insurance shall so state.

- (2) Fire and Extended Coverage, including water damage and debris cleanup provisions, in an amount not less than ninety percent (90%) of full replacement value of all improvements located within the Leased Premises. The fire and extended coverage policies shall be endorsed with a Loss Payee endorsement in favor of Lessor. It is agreed that any insurance proceeds in excess of Twenty-Five Thousand Dollars (\$25,000) resulting from a loss under said policies shall be payable jointly to Lessor and Lessee to ensure that said proceeds will be reinvested in rebuilding and/or repairing the damaged portions of the Leased Premises and any damaged or destroyed improvements.

- (i) As a trust fund to pay for the reconstruction, repair, or replacement of the damaged or destroyed improvements, in kind and scope, in progress payments as the work is performed. Any funds remaining after completion of said work shall be retained by said mortgagee or beneficiary and applied to reduce any debt secured by such mortgage or deed of trust. Furthermore, any funds remaining after full payment of said debt shall be paid to Lessee; or
  - (ii) In the event that this Lease is terminated with consent of both Lessor and said mortgagee or beneficiary, and the improvements are not reconstructed, repaired, or replaced, the insurance proceeds shall be retained, without liability, by said mortgagee or beneficiary to the extent necessary to fully discharge the debt secured by said mortgage or deed of trust. Furthermore, said mortgagee or beneficiary shall hold the balance thereof to restore the Leased Premises to a neat and clean condition. Any remaining funds shall lastly be paid to Lessor and Lessee, as their interests may appear.
- (3) In the event underground storage tanks are located on the Leased Premises, Lessee is required to comply with Code of Federal Regulations, Title 40, Chapter I, Subchapter H or Title 23, Division 3, Chapter 18 of California Code of Regulations, collectively, herein "UST Law." At the time Lessee is required to comply with any provisions of UST Law requiring financial assurance mechanisms, Lessee shall provide Lessor with a certified copy of its Certification of Financial Responsibility. If Lessee's program for financial responsibility requires insurance, then Lessee's policy(ies) shall name Lessor and its officers, employees, and agents as additional insureds, and all other terms of Subparagraph (b), below, shall apply. Should Lessee change its financial assurance mechanisms, Lessee shall immediately provide Lessor with a certified copy of its revised Certification of Financial Responsibility.

(b) General Requirements

- (1) All required insurance shall be in force the first day of the term of this Lease, and shall be maintained continuously in force throughout the term of this Lease. In addition, the cost of all required insurance shall be borne by Lessee. During the entire term of this Lease, Lessee shall provide Lessor with Certificates, in a form acceptable to Lessor, evidencing the existence of the necessary insurance policies and original endorsements effecting coverage required by this Paragraph. The Certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind insurance on its behalf. Notwithstanding the foregoing, Lessor reserves the right to require complete, certified copies of all required policies at any time.
- (2) All liability insurance policies shall name, or be endorsed to name Lessor and its officers, employees, and agents as additional insureds and protect Lessor and its officers, employees, and agents against any legal costs in defending claims. All liability policies shall provide cross-liability coverage. All insurance policies shall be endorsed to state that coverage will not be suspended, voided, cancelled, or reduced in coverage or in limits, except after Lessee has furnished Lessor with thirty (30) days' prior written notice by certified mail. All insurance policies shall be endorsed to state that Lessee's insurance is primary and not excess or contributory to any insurance issued in the name of Lessor. Further, all insurance companies must be satisfactory to Lessor.
- (3) Any deductibles or self-insured retentions must be declared and acceptable to Lessor, provided that, for so long as SDCCC or Permitted Assignee is the Lessee under this Lease, a deductible of up to \$100,000 shall be deemed acceptable. If the deductibles or self-insured retentions are unacceptable to Lessor, then Lessee shall have the option to either: (i) reduce or eliminate such deductibles or self-insured retentions as respects the Lessor and its officers, employees, and agents; or, (ii) procure a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses.
- (4) Lessor shall retain the right at any time to review the coverage, form, and amount of insurance required herein. If, in the opinion of Lessor, the insurance provisions in this Lease do not provide adequate protection for Lessor and/or members of the public using the Leased Premises or using services connected with Lessee's use or occupancy of the Leased Premises, Lessor may require Lessee to obtain

Insurance sufficient in coverage, form, and amount to provide adequate protection. Lessor's requirements shall be reasonable, but shall be designed to ensure protection from and against the kind and extent of risks that exist at the time a change in insurance is required.

- (5) Lessor shall notify Lessee in writing of changes in the insurance requirements. With respect to changes in insurance requirements that are available from Lessee's then-existing insurance carrier, Lessee shall deposit Certificates evidencing acceptable insurance policies with Lessor incorporating such changes within sixty (60) days of receipt of such notice. With respect to changes in insurance requirements that are not available from Lessee's then-existing insurance carrier, Lessee shall deposit Certificates evidencing acceptable insurance policies with Lessor, incorporating such changes, within one hundred twenty (120) days of receipt of such notice. In the event Lessee fails to deposit insurance Certificates as required herein, this Lease shall be in default without further notice to Lessee, and Lessor shall be entitled to exercise all legal remedies.
- (6) If Lessee fails or refuses to maintain insurance as required in this Lease, or fails to provide proof of insurance, Lessor has the right to declare this Lease in default without further notice to Lessee, and Lessor shall be entitled to exercise all legal remedies. Further, Lessor shall have the right, but not the obligation, to procure insurance in an amount and form consistent with the requirements of this Paragraph. The cost of said insurance shall be payable by Lessee to Lessor as additional rent under this Lease on or before the first (1<sup>st</sup>) day of the month immediately following written notice of Lessor's procurement of said insurance.
- (7) The procuring of such required policies of insurance shall not be construed to limit Lessee's liability hereunder, nor to fulfill the indemnification provisions and requirements of this Lease. Notwithstanding said policies of insurance, Lessee shall be obligated for the full and total amount of any damage, injury, or loss caused by negligence or neglect connected with this Lease, or with the use or occupancy of the Leased Premises.
- (8) Lessee agrees not to use the Leased Premises in any manner, even if use is for purposes stated herein, that will result in the cancellation of any insurance Lessor may have on the Leased Premises or on adjacent premises, or that will cause cancellation of any other insurance coverage for the Leased Premises or adjoining premises. Lessee further agrees not to keep on the Leased Premises or permit

to be kept, used, or sold thereon, anything prohibited by any fire or other insurance policy covering the Leased Premises. Lessee shall, at its sole expense, comply with all reasonable requirements for maintaining fire and other insurance coverage on the Leased Premises.

**26. POLICY OF LESSOR:** It is Lessor's policy that prevailing wage rates shall be paid all persons employed on the lands within Lessor's jurisdiction.

**27. WARRANTIES-GUARANTEES-COVENANTS:** Lessor makes no warranty, guarantee, covenant, including but not limited to covenants of title and quiet enjoyment, or averment of any nature whatsoever concerning the condition of the Leased Premises, including the physical condition thereof, or any condition which may affect the Leased Premises. It is agreed that Lessor will not be responsible for any loss, damage, and/or costs, which may be incurred by Lessee by reason of any such condition or conditions.

**28. DAMAGE TO OR DESTRUCTION OF LEASED PREMISES:** Should Lessee-owned improvements be: (i) damaged or destroyed by fire, the elements, acts of God, or by any other cause; or (ii) declared unsafe or unfit for occupancy or use by a public entity with the appropriate authority; (i) and/or (ii) hereinafter "event," Lessee shall, within ninety (90) days of such event, commence and diligently pursue to completion the repair, replacement, or reconstruction of the improvements necessary to permit full occupancy and use of the Leased Premises for the uses required herein. Repair, replacement, or reconstruction of such improvements shall be accomplished in a manner and according to Plans approved by Lessor. Provided, however, Lessee shall not be obligated to repair, reconstruct, or replace the improvements following their destruction in whole or substantial part, except to the extent the loss is covered by insurance required pursuant to Paragraph 25 herein (or would be covered regardless of whether such required insurance is actually in effect).

If Lessee elects not to restore, repair, or reconstruct as herein required, then this Lease shall terminate. Further, Lessor shall have any rights to which it would be entitled under the provisions of Paragraph Nos. 8 and 25 herein.

No event described herein shall relieve Lessee of its obligations to pay all rent and other amounts otherwise due hereunder.

**29. QUITCLAIM OF LESSEE'S INTEREST UPON TERMINATION:** Upon termination of this Lease for any reason, including but not limited to termination because of default by Lessee, Lessee shall execute, acknowledge, and deliver to Lessor within thirty (30) days after receipt of written demand therefore a good and sufficient deed whereby all Lessee's right, title, and interest in the Leased Premises is quitclaimed to Lessor. Should Lessee fail or refuse to deliver the required deed to Lessor, Lessor may prepare and record a notice reciting the failure of Lessee to execute, acknowledge, and deliver such deed. Said notice

shall be conclusive evidence of the termination of this Lease and of all right of Lessee, or those claiming under Lessee, in and to the Leased Premises.

**30. PEACEABLE SURRENDER:** Upon expiration of this Lease or earlier termination or cancellation thereof, as herein provided, Lessee shall peaceably surrender the Leased Premises to Lessor in as good condition as the Leased Premises were at the Commencement Date of this Lease, except as the Leased Premises were repaired, rebuilt, restored, altered, or added to as permitted or required by the provisions of this Lease, ordinary wear and tear excepted, and subject to Paragraph 6 herein. If Lessee fails to surrender the Leased Premises at the expiration of this Lease or the earlier termination or cancellation thereof, Lessee shall defend and indemnify Lessor from all liability and expense resulting from the delay or failure to surrender, including, without limitation, any succeeding Lessee claims based on Lessee's failure to surrender.

**31. WAIVER:** Should either Lessor or Lessee waive any breach by the other of any Lease covenant, condition, or agreement, such waiver shall not be, nor be construed to be, a waiver of any subsequent or other breach of the same or any other Lease covenant, condition, or agreement. Further, failure on the part of either party to require or exact the other's full and complete compliance with any of the Lease covenants, conditions, or agreements shall not be, nor be construed as in any manner changing the terms, or preventing the enforcement in full, of the provisions hereof. In addition, Lessor's subsequent acceptance of rent hereunder shall not be deemed to be a waiver of any preceding Lessee breach of any Lease term, covenant, or condition, other than Lessee's failure to pay the particular rent so accepted, regardless of Lessor's knowledge of Lessee's preceding breach at the time rent is accepted.

**32. HOLDOVER:** This Lease shall terminate without further notice at expiration of the term. Any holding over by Lessee after either expiration or termination shall not constitute a renewal or extension, or give Lessee any rights in or to the Leased Premises.

If Lessee, with Lessor's consent, remains in possession of the Leased Premises after Lease expiration or termination, such possession shall be a month-to-month tenancy terminable on thirty (30) days notice furnished at any time by either party to the other. In addition, all provisions of this Lease, except those pertaining to term, shall apply to the month-to-month tenancy, and Lessee shall continue pay all rent required by this Lease. Provided, however if percentage rent is required by the Lease, it shall be paid monthly on or before the tenth (10<sup>th</sup>) day of each month, including the tenth (10<sup>th</sup>) day of the month following the expiration of any such holdover period.

**33. PARAGRAPH HEADINGS:** The Table of Contents and Paragraph Headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision thereof.



**34. ENTIRE UNDERSTANDING:** This Lease contains the entire understanding and agreement of the parties. Lessee acknowledges there is no other written or oral understanding or agreement between the parties with respect to the Leased Premises, and that this Lease supersedes all prior negotiations, discussions, obligations, and rights of the parties hereto. No waiver, modification, amendment, or alteration of this Lease shall be valid unless it is expressly in writing and signed by authorized representatives of the parties hereto. Each of the parties to this Lease acknowledges that no other party, agent or representative of any other party, has made any promise, representation, waiver, or warranty whatsoever, expressed or implied, which is not expressly contained in writing in this Lease. Each party further acknowledges it has not executed this Lease in reliance upon any collateral promise, representation, waiver, or warranty, or in reliance upon any belief as to any fact not expressly recited in this Lease.

**35. TIME IS OF THE ESSENCE:** Time is of the essence of each and all of the terms and provisions of this Lease. This Lease shall inure to the benefit of and be binding upon the parties hereto and any successors of Lessee as fully and to the same extent as though specifically mentioned in each instance. All covenants, conditions, and agreements in this Lease shall extend to and bind any assigns and sublessees of Lessee.

**36. NOTICES:** All notices provided for by this Lease or by law to be given or served upon Lessor or Lessee shall be in writing and: (i) personally served upon Lessor or Lessee, or any person hereafter authorized by either party in writing to receive such notice, or (ii) served by certified letter addressed to the appropriate address hereinafter set forth, or to such other address designated in writing by the respective party.

**To Lessor**

Executive Director  
San Diego Unified Port District  
Post Office Box 120488  
San Diego, CA 92112-0488

**With a copy to:**

Raymond Carpenter  
2145 East Belt Street  
San Diego, CA 92113

**To Lessee**

San Diego Convention Center Corporation  
President and Chief Executive Officer  
111 West Harbor Drive  
San Diego, CA 92101

**And:**

San Diego California Properties, LLC  
c/o Arthur Engel  
1311 First Street  
Coronado, CA 92118

Should any consented-to assignee, consented-to purchaser, or Consented-to-Lender notify Lessor in writing of its desire to receive notices, such party shall also be personally served, or served by certified letter at such appropriate address designated in writing by the respective party.

Any notice or notices given or served as provided herein shall be effectual and binding for all purposes upon the parties so served; provided, however, if served by certified mail,

service will be considered completed and binding on the party served forty-eight (48) hours after deposit in the U.S. Mail.

**37. REMOVAL OF MATERIALS:** Lessee shall, upon expiration of this Lease or sooner termination as herein provided, remove within sixty (60) days all materials, including without limitation all ships, vessels, barges, hulls, debris, and surplus and salvage items, hereinafter "Materials," from the Leased Premises and adjacent property, so as to leave the same in as good condition as when first occupied by Lessee, subject to reasonable wear and tear. Provided, however, that if Lessee fails to remove all Materials within sixty (60) days, Lessor may remove, sell, or destroy said Materials at the expense of Lessee. Further, Lessee agrees to pay Lessor the reasonable cost of such removal, sale, or destruction; or, at the option of Lessor, said Materials not removed, sold, or destroyed by Lessee shall become the property of Lessor, without cost to Lessor, and without any payment to Lessee.

During any period of time required to remove said Materials or to test for and/or remediate Hazardous Materials as required in Paragraph 42 herein, Lessee shall continue to pay the full rent to Lessor in accordance with this Lease, which said rent shall be prorated daily.

**38. WASTE/NUISANCE:** Lessee shall not use the Leased Premises in a manner that constitutes waste or nuisance.

**39. NUMBER AND GENDER:** Words of any gender used in this Lease shall include any other gender and each word in the singular number shall include the plural whenever the tense requires.

**40. APPLICABLE LAW:** The Lease will be governed by and construed and enforced in accordance with the laws of the State of California.

**41. ATTORNEY FEES:** Should any suit be commenced to enforce, protect or establish any right or remedy of any of the terms and conditions hereof, including without limitation a summary action commenced by Lessor under the laws of the state of California relating to the unlawful detention of property, the prevailing party shall be entitled to have and recover from the losing party reasonable attorney fees and costs of suit.

**42. HAZARDOUS MATERIALS:**

- (a) **Definition of "Hazardous Material."** The term "Hazardous Material" shall mean any pollutant, contaminant, or hazardous, dangerous, or toxic chemical, material, or substance, including oil and petroleum products, which now or in the future may be within the meaning of any applicable, federal, state, or local law, regulation, ordinance, or requirement at any concentration that is or has become regulated by the United States, the State of California, or any local government authority having jurisdiction over the Leased Premises.

- (b) **Lessee Use of Hazardous Materials.** Lessee shall not cause or permit any Hazardous Material, or products or materials which include any hazardous substance as a component, to be generated, brought onto, used, stored, emitted, released or disposed of in or about the Leased Premises by Lessee or its agents, employees, contractors, sublessees, or invitees unless expressly approved, at Lessor's sole discretion, in writing by Lessor after submittal by Lessee of Material Safety Data Sheets ("MSDS") or other information requested by Lessor. Limited quantities of equipment, materials and supplies customarily used in connection with the construction of improvements and standard office, food service and janitorial supplies customarily used in places of business which contain chemicals categorized as Hazardous Material are excluded from this requirement. Lessee shall use, store, and dispose of all such Hazardous Materials in strict compliance with all applicable statutes, ordinances, regulations, and other requirements in effect during the Lease Term that relate to public health and safety and protection of the environment ("Environmental Laws"); and shall comply at all times with all Environmental Laws.
- (c) **Notice of Release or Investigation.** If during the term of this Lease (including any extensions), Lessee becomes aware of (i) any actual or threatened release of any Hazardous Material on, in, under, from, or about the Leased Premises; or (ii) any inquiry, investigation, proceeding, or claim (collectively "inquiry") by any government agency or other person regarding the presence of any Hazardous Material on, in, under, from or about the Leased Premises, Lessee shall give Lessor written notice of the release or inquiry within five (5) days after Lessee learns or first has reason to believe there has been a release or inquiry and shall simultaneously furnish to Lessor copies of any claims, notices of violation, reports, warning or other writings received by Lessee that concern the release or inquiry.
- (d) **Lessor Right to Inspect.** If Lessee has in the past or continues to use, dispose, generate, or store Hazardous Materials on the Leased Premises, Lessor or its designated representatives, at Lessor's sole discretion, may at any time during the term of this Lease, but is not obligated to, enter upon the Leased Premises and make any inspections, tests or measurements Lessor deems necessary to determine if a release of Hazardous Materials has occurred. Lessor shall furnish Lessee a minimum of twenty-four (24) hours' notice in writing prior to conducting any inspections or tests, unless, in Lessor's sole judgment, circumstances require otherwise. Such tests shall be conducted in a manner so as to attempt to minimize any inconvenience and disruption to Lessee's operation as is practicable. If such tests indicate a release of Hazardous Materials, then Lessor, at Lessor's sole discretion, may require Lessee, at Lessee's sole expense and at any time during the term of this Lease, to have such tests for such Hazardous Materials conducted by a

qualified party or parties on the Leased Premises. If Lessor has reason to believe any Hazardous Materials originated from a release on the Leased Premises have contaminated any area outside the Leased Premises, including but not limited to surface and groundwater, then Lessor, at Lessor's sole discretion, may require Lessee, at Lessee's sole expense and at any time during the term of this Lease, to have tests for such Hazardous Materials conducted by a qualified party or parties on said area outside the Leased Premises. Lessor's failure to inspect, test or take other actions pursuant to this Paragraph 42(d) regarding the Leased Premises, shall in no way relieve Lessee of any responsibility for a release of a Hazardous Material.

- (e) Clean-up Obligations. If the presence of any Hazardous Material brought onto the Leased Premises by Lessee or Lessee's employees, agents, sublessees, contractors, or invitees, or generated by same during the term of this Lease results in contamination of the Leased Premises, adjacent properties or the San Diego Bay, Lessee shall promptly take all necessary actions, at Lessee's sole expense, to remove or remediate such Hazardous Materials. Lessee shall provide notice to Lessor prior to performing any removal or remedial action. Lessee shall not propose nor agree to any covenant of use restriction as part of any removal or remediation required as a result of this Paragraph 42(e). To the extent Lessor incurs any costs or expenses in performing Lessee's obligation to clean-up contamination resulting from Lessee's operations or use of the Leased Premises, Lessee shall promptly reimburse Lessor for all costs and expenses incurred within thirty (30) days. Any amounts not so reimbursed within thirty (30) days after Lessee's receipt of an itemized statement therefore shall bear interest at the Prime Rate plus Five Percent (5%) per annum compounded monthly. This provision does not limit the indemnification obligation set forth in Paragraph 42(f). The obligations set forth in this Paragraph 42(e) shall survive any expiration or other termination of this Lease.

- (l) Clean-up Extending Beyond Lease Term. Should any clean-up of Hazardous Materials for which Lessee is responsible not be completed prior to the expiration or sooner termination of the Lease, including any extensions thereof, then: (A) Lessee shall deposit into an escrow account an amount of money equal to the balance of the estimated costs of the clean-up, together with instructions for the disbursement of such amount in payment of the costs of any remaining clean-up as it is completed, and (B) if the nature of the contamination or clean-up required of Lessee is of such a nature as to make the Leased untenable or unleaseable, then Lessee shall be liable to Lessor as a holdover lessee until the clean-up has been sufficiently completed to make the Leased Premises suitable for lease to third parties. The estimated cost of the clean-up shall require approval of the Lessor.

(H) **Financial Security.** If Lessor determines, in its reasonable discretion, that Lessee does not have insurance or other financial resources sufficient to enable Lessee to fulfill its obligations under this Paragraph 42 (e) , whether or not accrued, liquidated, conditional, or contingent, then Lessee shall, at the request of Lessor, procure and thereafter maintain in full force and effect such environmental impairment liability and/or pollution liability insurance policies and endorsements, or shall otherwise provide such collateral or security reasonably acceptable to Lessor as is appropriate to assure that Lessee will be able to perform its duties and obligations hereunder.

(f) **Indemnification.** Lessee shall, at Lessee's sole expense and with counsel reasonably acceptable to Lessor, indemnify, defend, and hold harmless Lessor and Lessor's directors, officers, employees, partners, affiliates, agents, successors, and assigns with respect to all losses, including reasonable attorneys' and environmental consultants' fees, arising out of or resulting from Hazardous Material contamination in, on, under or about the Leased Premises, (with the sole exceptions set forth in Paragraph 44 (b) and (c) herein) or the violation of any Environmental Law, by Lessee or Lessee's agents, assignees, sublessees, contractors, or invitees. This indemnification applies whether or not the concentrations of any such Hazardous Material is material, the concentrations exceed state or federal maximum contaminant or action levels, or any government agency has issued a cleanup or other order. This indemnification shall survive the expiration or termination of this Lease. This indemnification includes, but is not necessarily limited to:

- (i) Losses attributable to diminution in the value of the Leased Premises;
- (ii) Loss or restriction of use of rentable space(s) in the Leased Premises;
- (iii) Adverse effect on the marketing of any space(s) in the Leased Premises;
- (iv) All other liabilities, obligations, penalties, fines, claims, actions (including remedial or enforcement actions of any kind and administrative or judicial proceedings, orders, or judgments), damages (including consequential and punitive damages), and costs (including attorney, consultant, and expert fees and expenses) resulting from the release or violation; and,
- (v) All costs (including reasonable attorneys' fees, consulting fees and subcontracted costs) incurred by Lessor in undertaking any assessment or remediation of the Leased Premises that might not

have been fully resolved by Lessee by the time this Lease terminates or expires.

Lessor shall have a direct right of action against Lessee even if no third party has asserted a claim. Furthermore, Lessor shall have the right to assign said indemnity. The obligations set forth in this Paragraph 42(f) shall survive any expiration or other termination of this Lease.

- (g) Termination of Lease. Upon the expiration or earlier termination of the term of the Lease, Lessee shall: (i) cause all Hazardous Materials previously owned, stored, or used by Lessee to be removed from the Leased Premises and disposed of in accordance with all applicable provisions of law; (ii) remove any underground or aboveground storage tanks or other containers installed or used by Lessee, or its predecessors, to store any Hazardous Material on the Leased Premises, and repair any damage to the Leased Premises caused by such removal; (iii) cause any soil or other portion of the Leased Premises which has become contaminated by any Hazardous Material stored or used by Lessee, or its predecessors, to be decontaminated, detoxified, or otherwise cleaned-up in accordance with the applicable requirements of any relevant government authorities; and (iv) surrender possession of the Leased Premises to Lessor free of contamination attributable to Hazardous Materials generated or used by Lessee or stored or disposed of by any party other than Lessor in or on the Leased Premises during the term of this Lease.

**43. STORAGE TANKS:**

- (a) Underground Storage Tanks. No underground storage tanks ("USTs") shall be permitted to be installed on the Leased Premises during the term of this Lease without the prior written consent of the Lessor's Executive Director in his or her sole and absolute discretion. In the event Lessee obtains such approval to install a UST on the Leased Premises, Lessee shall be responsible for complying with all laws and regulations pertaining to such UST, including tank monitoring of such UST as required by the County of San Diego Hazardous Material Management Division (HMMD) or any other responsible agency. Lessee further agrees to take responsibility for reporting unauthorized releases from USTs to HMMD and the Lessor within twenty-four (24) hours of such unauthorized release. Lessee will be responsible for all fees and costs related to the unauthorized release of any Hazardous Material including, but not limited to: investigative, surface and groundwater clean-up, and expert and agency fees. Lessee shall maintain evidence of financial responsibility for taking corrective action and for compensating third parties for bodily injury and/or property damage caused by a release from a UST. Lessee further agrees to be responsible for maintenance and repair of

the USTs; obtaining tank permits; filing a business plan with HMMD or other responsible agency; and for paying UST fees, permit fees, and other regulatory agency fees relating to USTs.

Lessee agrees to keep complete and accurate records on the Leased Premises for a period of not less than thirty-six (36) months from the applicable events including, but not limited to, permit applications, monitoring, testing, equipment installation, repairing and closure of the USTs, and any unauthorized releases of Hazardous Materials. Lessee also agrees to make such records available for Lessor or responsible agency inspection. Lessee further agrees to include a copy of Health and Safety Code, Chapter 6.7, Section 25299, as part of any agreement between Lessee and any operator of USTs.

Furthermore, Lessee shall be responsible for compliance with all other laws and regulations presently existing, or hereinafter enacted, applicable to USTs, including without limitation any such laws and regulations which alter any of the above requirements.

- (b) Aboveground Storage Tanks. No aboveground storage tanks ("ASTs") shall be permitted to be installed on the Leased Premises during the term of this Lease without the prior written consent of the Lessor's Executive Director in his or her sole and absolute discretion. In the event Lessee obtains such approval to install an AST, Lessee shall be responsible for complying with all laws and regulations pertaining to such AST. Lessee shall, in accordance with this Lease and applicable laws and regulations, secure and pay for all necessary permits and approvals, prepare a spill prevention control counter measure plan and conduct periodic inspections to ensure compliance therewith, including conformance with the latest version of said applicable laws and regulations. In addition, Lessee shall maintain and repair said tanks to conform and comply with all other applicable laws and regulations for ASTs, including without limitation all of the requirements of Health & Safety Code, Chapter 6.67, Sections 25270 through 25270.13 as presently existing or as hereinafter amended, including without limitation conducting daily visual inspection of said tanks, allowing the San Diego Regional Water Quality Control Board ("SDRWQCB"), Lessor, and/or responsible agency, to conduct periodic inspections. Lessee also shall comply with valid orders of the SDRWQCB, filing the required storage tank statement and payment of the fee therefore, establishing and maintaining the required monitoring program and systems, reporting spills as required, and payment of lawfully imposed penalties as provided therein and as otherwise provided by law. The Lessee shall be responsible for all costs associated with any unauthorized release from ASTs, including but not limited to, investigative, surface and groundwater clean-up, and expert and agency fees.

44. **ENVIRONMENTAL DISCLOSURES AND LESSEE WARRANTIES:**

- (a) **Lessee's Warranties:** Lessee represents and warrants to Lessor that Lessee has conducted or been encouraged and allowed to conduct a full inspection of each parcel of the Leased Premises, and has not been denied access to any area thereof. Lessee has had a complete right and full opportunity to bring experts onto the Leased Premises and to conduct all tests Lessee believes to be necessary to determine the condition of the Leased Premises. Lessee is charged with full knowledge of Environmental Laws and Lessee's review and investigation of the condition of the Leased Premises and, to the extent Lessee has elected to do so, has included consideration of the applicability and effect of such laws and regulations. In particular, Lessee has investigated or been encouraged to investigate, to Lessee's own satisfaction, the environmental condition of the soil, surface water, groundwater, sediments and structures on the Leased Premises. Lessee specifically acknowledges that it is not relying on any representation or warranties of any kind whatsoever, express or implied, from Lessor as to any matters concerning the environmental condition of the Leased Premises. Lessee further specifically acknowledges that Lessor has no knowledge regarding the environmental condition of the Leased Premises above and beyond that contained in the documents identified in (b) below (which documents shall not be construed as expressed or implied warranties or representations of any kind by Lessor) and that, despite the ability to conduct further testing of the Leased Premises, Lessee has chosen instead to solely rely on existing data (both its own and that contained in public documents) to evaluate the environmental condition of the Leased Premises.
- (b) **Lessee Disclosure.** Lessee acknowledges and agrees that the Leased Premises is located adjacent to the San Diego Convention Center which operates twenty-four (24) hours per day and seven (7) days per week. Lessee also acknowledges and agrees that past uses made of portions of the Leased Premises have included a ship repair facility, a marine service station, a marine contractor's yard and other uses which may have resulted in the generation, disposal or release of Hazardous Materials on, in, under or about the Leased Premises. Lessee further acknowledges and accepts that the Leased Premises may have groundwater monitoring wells required by the RWQCB that will need to be in continuous operation until their removal is approved by RWQCB and any other governmental agency having jurisdiction. Lessee also acknowledges receipt of (i) California Regional Water Quality Control Board Clean-Up and Abatement Order No. 95-21 dated May 24, 1995 together with Addendum No. 1, Addendum No. 2 dated November 12, 1997 and Addendum No. 3 dated June 15, 2001 (collectively "CAO"); (ii) Agreement for Joint Exercise of Powers between Lessor and the Redevelopment Agency for the City of San Diego bearing Lessor Document No. 41617; (iii) Polanco Redevelopment Act Remediation Agreement between RWQCB and Lessor bearing Lessor



Document No. 41840; (iv) PTI Environmental Services Campbell Shipyard Sediment Characterization, Volumes I and II dated June 1991; (v) Ecosystems Management Associates, Inc. Campbell Shipyard NPDES Permit Marine Sediment Monitoring and Reporting Annual Report dated August 1999; (vi) Hart Crowser, Inc. Phase II Soils Characterization Report for Campbell Shipyard dated February 2001; (vii) Kleinfelder, Inc. Remedial Action Workplan for Campbell Shipyard dated December 6, 2000; (viii) Weston Remediation of Former Campbell Shipyard Closeout Report dated June 2002; (ix) Ninyo & Moore Limited Historical Study San Diego Bay Waterfront dated April 20, 2001; (x) Hart Crowser, Inc., Volumes I and II, Final Phase II Sediment Characterization Report for Campbell Shipyard dated May 25, 2001; (xi) AMEC Fifth Avenue Landing Underground Storage Tank Investigation dated July 2, 2001; (xii) URS Study of Seawall Evaluation at Campbell Shipyard Site dated September 26, 2001; (xiii) AMEC Historical Review of Analytical Data Collected at Fifth Avenue Landing dated October 28, 2001; (xiv) Ninyo & Moore Dissolved Metals Groundwater Analytical Results for Vicinity of 8<sup>th</sup> Avenue dated February 22, 2002; (xv) Blaylock Engineering Group Structural Inspection of Campbell Shipyard Seawall dated July 16, 2002; (xvi) Anchor Environmental, LLC Campbell Shipyard Data Gap Sediment Field Sampling Report dated September 19, 2002; (xvii) Ninyo & Moore Groundwater Monitoring Report for Former Campbell Shipyard dated April 18, 2003; (xviii) Anchor Environmental, LLC Campbell Shipyard Sediment Cap-in-Place Alternative Analysis dated June 2003; and (xix) Ninyo & Moore Limited Subsurface Assessment for Spinnaker Hotel Site dated July 31, 2003. Lessee further hereby acknowledges, as provided in Paragraph 49, that the Leased Premises is being leased in an "AS-IS, WITH ALL FAULTS" condition. Notwithstanding the foregoing sentence, Lessee shall not be liable for any damages, claims, costs or expenses that arise solely as a result of releases from the former operations of Campbell Industries, General Petroleum Corporation of California and Mobil Oil Corporation on the Leased Premises ("Existing Contaminants"), including without limitation, any remediation costs required to comply with the CAO referenced above, except those costs and expenses (including attorney's fees) that arise as a result of Lessee being named as a responsible party or defendant based on allegations regarding Lessee's own operations and as specifically provided herein in subparagraphs (d), (e), and (f) below. With the sole exception set forth in the preceding sentence, it is the parties' intent and Lessee understands and agrees that all other Hazardous Materials on Parcel Nos. 1 and 2 of the Leased Premises, if any, whether existing prior to or subsequent to the Commencement Date shall be Lessee's sole responsibility.

- (c) Adjacent Property: "Adjacent Property" shall mean the properties identified for cleanup and remediation in the CAO identified in Section 44(b) above, but not including any portion of the Leased Premises." Lessee acknowledges and agrees that the Adjacent Property is adjacent to and contiguous with property,

the past uses of which have included all of those past uses identified in Paragraph 44(b) above, any or all of which uses may have resulted in a release of Hazardous Materials on, in or about the Adjacent Property. To the best of Lessor's knowledge, however, Lessor has not received any written notice of any material proceedings, action, or other claim for liability arising under any Environmental Law from any person or governmental body regarding the Adjacent Property of the Leased Premises with the exception of the California Regional Water Quality Control Board ("Regional Board") Clean-Up and Abatement Order No. 95-21, dated May 24, 1995, and addendums ("CAO") issued to the former Campbell Industries. The CAO included an analysis of the sediment data from Adjacent Property. Lessor will itself, or through responsible parties, complete the remediation required for rescission of the CAO. Rescission of the CAO will constitute acceptance by the Regional Board of the conditions of the Leased Premises, including Adjacent Property, that were evaluated in the CAO. The regulatory review process for the Adjacent Property sediment is summarized in a September 23, 2003 Memorandum entitled "Fifth Avenue Landing Sediment" authored by Paul Brown, Project Analyst in the Lessor's Recreation & Environmental Services Department, addressed to Karen Weymann, Assistant Director in the Lessor's Real Estate Department, a copy of which is on file in Lessor's Real Estate Department. The parties hereby agree that to the extent a cleanup may be required on all or a portion of Adjacent Property under the CAO to respond to Existing Contaminants, Lessee shall not be liable for the costs required to comply with the CAO, as specifically set forth in Paragraph 44(b). Notwithstanding the foregoing, it is the parties' intent that Lessee shall be liable, pursuant to the provisions set forth in Paragraph 45 herein, for the presence or release of Hazardous Materials in, on, under or about Adjacent Property as a result of Lessee's construction on, or use, operation or occupancy of, the Leased Premises

- (d) Remedial Investigations and Remedial Work. As the above-referenced CAO indicates, the RWQCB has assumed the role of lead agency for mitigation of releases of Existing Contaminants. Lessor intends to undertake and complete all necessary investigations of releases of Existing Contaminants and associated remedial work, as required by RWQCB under the CAO, sufficient to satisfy RWQCB that the goals and objectives of the approved Remedial Action Plan ("RAP") and CAO have been or can be accomplished. Such remedial work may be premised on a risk-based corrective action approach. Lessor may pursue cost recovery actions against those parties responsible for releases of Existing Contaminants and, if any recovery is made, Lessor shall be entitled to retain all funds obtained through such actions and Lessee disclaims all rights, if any, to any such funds. Lessee hereby grants to Lessor (and Lessor's contractors), the right to enter the Leased Premises to investigate, test for and remove Existing Contaminants at the Lessor's sole cost.

- (e) Residual Impacts. Lessee acknowledges and accepts that not all Hazardous Materials will necessarily be removed from the Leased Premises following completion of activities described in the RAP and CAO, even after issuance of the closure letter(s). Lessee understands that although the Leased Premises will be prepared to a condition in which Impacts have been mitigated to a level where the Leased Premises meet the requirements of the CAO, some Hazardous Materials (including Existing Contaminants) may remain at the Leased Premises, at or below concentrations consistent with the regulatory guidelines in the CAO ("Residual Impacts"). Lessee acknowledges and agrees that, should Lessee, its successor or assigns determine or desire to undertake construction or additional development activities at the Leased Premises, any increased costs related to development by reason of such Hazardous Materials (including Residual Impacts) shall be borne by Lessee, its successors and assigns and Lessor will assume no responsibility therefore.
- (f) Waste Removal. Although Existing Contaminants on, in, under or about the Leased Premises have been, or will be, remediated by Lessor as required by the CAO, Lessee hereby acknowledges that subsequent excavation of soils from the Leased Premises, if applicable, could result in exportation of a regulated waste, requiring appropriate characterization, handling, transport and disposal (together "Regulated Waste Removal"). Lessor takes no responsibility and assumes no liability whatsoever for Regulated Waste Removal. Accordingly, Lessee hereby waives any claim, or potential claim, it may have to recover costs or expenses arising out of or associated with Regulated Waste Removal and agrees to indemnify, defend and hold harmless Lessor from and against any and all claims, liabilities, losses, damages, costs, and expenses arising from, out of, or in any way related to Regulated Waste Removal.
- (g) Worker Protection. Lessor accepts no liability or responsibility for ensuring that Lessee's workers, including without limitation those conducting testing, construction and maintenance activities, on the Leased Premises, is satisfactorily protected from Hazardous Materials (including Residual Impacts as defined above) as required in Title 28 of the Code of Federal Regulations or similar State requirements. Lessee shall assess all human health risks from vapor transport or direct contact with Hazardous Materials and incorporate such engineering and institutional controls as may be required to sufficiently protect human health of onsite workers and transient visitors. Lessee hereby waives any claim, or potential claim, it may have to recover any damages, losses, costs and expenses related to worker exposure or alleged exposure to any onsite contamination and to indemnify, defend and hold harmless Lessor from and against any and all such claims, liabilities, losses, damages, costs, and expenses.
- (h) Additional Lessee Disclosure. Lessee further hereby acknowledges that additional environmental documentation, studies and activities subsequent to

the environmental documentation, studies and activities listed herein are available for review at the Office of the District Clerk upon request.

45. **"AS-IS" LEASE AND WAIVERS:** Lessee's execution of the Lease shall fully and finally constitute:

- (a) **Lessee's Acknowledgment.** Lessee's acknowledgment that Lessor has given to Lessee sufficient opportunity to consider, inspect and review, to Lessee's complete satisfaction: the land use; the environmental, biological, physical and legal condition of the Leased Premises; and the feasibility of Lessee's intended use and enjoyment of the Leased Premises including without limitation: (1) any and all rights, appurtenances, entitlements, obligations, and liabilities concerning the Leased Premises; (2) the physical condition of the Leased Premises, including, without limitation, the condition of the soils, subsoil media, sediments, surface waters and groundwaters at or under the Leased Premises; (3) the effect upon the Leased Premises of any and all applicable federal, state or local statutes, ordinances, codes, regulations, decrees, orders, laws or other governmental requirements (collectively, "Applicable Laws"); (4) the development potential of the Leased Premises including (without limitation on the preceding clause (3)) the effect of all Applicable Laws concerning land use, zoning, environmental quality and maintenance, endangered species, and traffic regulation; (5) the financial prospects of the Leased Premises and local market conditions, (6) Lessee's determination of the feasibility of Lessee's intended use and enjoyment of the Leased Premises; and (7) all other facts, circumstances, and conditions affecting, concerning or relating to the Leased Premises collectively referred to herein as the "Condition of the Leased Premises". Without limitation on any other provision of this Lease, Lessee expressly assumes the risk that adverse conditions affecting the Leased Premises have not been revealed by Lessee's investigations.
- (b) **Only Lessor's Express Written Agreements Binding.** Lessee acknowledges and agrees that no person acting on behalf of Lessor is authorized to make, and that except as expressly set forth in this Lease, neither Lessor nor anyone acting for or on behalf of Lessor has made, any representation, warranty, statement, guaranty or promise to Lessee, or to anyone acting for or on behalf of Lessee, concerning the Condition of the Leased Premises or any other aspect of the Leased Premises. Lessee further acknowledges and agrees that no representation, warranty, agreement, statement, guaranty or promise, if any, made by any person acting on behalf of Lessor which is not expressly set forth in this Lease will be valid or binding on Lessor.
- (c) **As-is Lease.** Lessee further acknowledges and agrees that Lessee's execution of this Lease shall constitute Lessee's representation, warranty and agreement that the Condition of the Leased Premises has been independently verified by Lessee to its full satisfaction, and that, except to the extent of the express covenants of Lessor set forth in this Lease, Lessee will be leasing the Leased Premises based solely upon and in reliance on its own inspections, evaluations, analyses and conclusions, or those of Lessee's

representatives; and that LESSEE IS LEASING THE LEASED PREMISES IN ITS "AS-IS, WITH ALL FAULTS" AND STATE OF REPAIR INCLUSIVE OF ALL FAULTS AND DEFECTS, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE LESSEE'S EXECUTION OF THIS LEASE. Without limiting the scope or generality of the foregoing, Lessee expressly assumes the risk that the Leased Premises do not or will not comply with any Applicable Laws now or hereafter in effect.

**(d) Waivers, Disclaimers and Indemnity.**

**(i) Waiver and Disclaimer.** Lessee hereby fully and forever waives, and Lessor hereby fully and forever disclaims, all warranties of whatever type or kind with respect to the Leased Premises, whether expressed, implied or otherwise including, without limitation, those of fitness for a particular purpose, tenant ability, habitability or use.

**(ii) Lessor's Materials.** Lessee further acknowledges that any information and reports including, without limitation, any engineering reports, architectural reports, feasibility reports, marketing reports, soils reports, environmental reports, analyses or data, or other similar reports, analyses, data or information of whatever type or kind which Lessee has received or may hereafter receive from Lessor or its agents or consultants have been furnished without warranty of any kind except as specifically set forth herein and on the express condition that Lessee will make its own independent verification of the accuracy, reliability and completeness of such information and that Lessee will not rely thereon. Accordingly, subject to terms of Paragraph 45(e) below, Lessee agrees that under no circumstances will it make any claim against, bring any action, cause of action or proceeding against, or assert any liability upon, Lessor or any of the persons or entities who prepared or furnished any of the above information or materials as a result of the inaccuracy, unreliability or incompleteness of, or any defect or mistake in, any such information or materials and Lessee hereby fully and forever releases, acquits and discharges Lessor and each person furnishing such information or materials of and from, any such claims, actions, causes of action, proceedings or liability, whether known or unknown.

**(e) Release and Waiver.**

**(i) Release.** Except to the extent of Claims (as defined below) against Lessor arising from any breach by Lessor of its covenants and obligations expressly provided in this Lease, Lessee, on behalf of Lessee, its successors and assigns, hereby fully and forever releases, acquits and discharges Lessor of and from, and hereby fully forever waives:

Any and all claims, actions, causes of action, suits, proceedings, demands, rights, damages, costs, expenses, losses, judgments,

provisional relief, fines, penalties, and fees, including, without limitation, any and all claims for compensation, reimbursement, or contribution whatsoever (individually and collectively, "Claims"), whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent, that Lessee or any of Lessee's successors or assigns now has or may have or which may arise or be asserted in the future arising out of, directly or indirectly, or in any way connected with: (A) any act or omission of Lessor (or any person acting for or on behalf of Lessor or for whose conduct Lessor may be liable), whether or not such act be the passive or sole negligence of Lessor, in connection with prior ownership, maintenance, operation or use of the Leased Premises; (B) any condition of environmental contamination or pollution at the Leased Premises (including, without limitation, the contamination or pollution of any soils, sediments, subsoll media, surface waters or groundwaters at the Leased Premises); (C) to the extent not already included in (B), above, the prior, present or future existence, release or discharge, or threatened release, of any Hazardous Materials at the Leased Premises, (including, without limitation, the release or discharge, or threatened release, of any Hazardous Materials into the air at the Leased Premises or into any soils, subsoils, surface waters or groundwaters at the Leased Premises); (D) the violation of, or noncompliance with, any Environmental Law or other Applicable Law now or hereafter in effect, however and whenever occurring; (E) the condition of the soil at the Leased Premises; (F) the condition of any improvements located on the Leased Premises including, without limitation, the structural integrity and seismic compliance of such improvements; (G) any matters which would be shown on an accurate ALTA land survey of the Leased Premises (including, without limitation, all existing easements and encroachments, if any); (H) all Applicable Laws now or hereafter in effect; (I) matters which would be apparent from a visual inspection of the Leased Premises, or (J) to the extent not already covered by any of the foregoing clauses (A) through (I), above, the use, maintenance, development, construction, ownership or operation of the Leased Premises by Lessor or any predecessor(s)-in-interest in the Leased Premises of Lessor.

- (ii) Waiver of Civil Code Section 1542. With respect to all releases made by Lessee under or pursuant to this Paragraph 45, Lessee hereby waives the application and benefits of California Civil Code § 1542 and hereby verifies that it has read and understands the following provision of California Civil Code § 1542:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

Lessee: 

**46. JOINT AND SEVERAL LIABILITY:** If Lessee, as a party to this Lease, is a partnership; joint venture; or is comprised of more than one party or entity, or a combination thereof; the obligations imposed on Lessee under this Lease shall be joint and several, and each general partner, joint venture, party or entity of Lessee shall be jointly and severally liable for said obligations. Furthermore, nothing herein shall be deemed or construed as creating a partnership or joint venture between Lessor and Lessee, or between Lessor and any other entity or party, or cause Lessor to be responsible in any way for the debts or obligations of Lessee, or any other party or entity.

**47. SECURITY DEPOSIT:** A security deposit in the sum of NINETY FOUR THOUSAND DOLLARS (\$94,000) shall be provided Lessor by Lessee, on or before the Commencement Date or subsequent assignment, transfer or foreclosure of this Lease. The security deposit shall be held by Lessor and used for the purpose of remedying Lessee's defaults under this Lease. The foregoing notwithstanding, for so long as SDCCC or Permitted Assignee is the Lessee under this Lease, no security deposit will be required.

Except as provided below, the security deposit shall be in the form of an Irrevocable Stand-By Letter of Credit drawn on a bank having a branch located in San Diego County or having a Moody's Long Term Letter of Credit rating of single A or higher and a Moody's Long Term Deposit rating of single A or higher. The principal sum shall be made payable to Lessor. Each Letter of Credit provided during the term of this Lease shall be valid for a minimum of twelve (12) months from date of issuance. Provided, however, when the remaining term of this Lease is one (1) year or less, the Letter of Credit shall be valid for a minimum of three (3) months beyond the Termination Date of this Lease. If a Letter of Credit is not valid for the entire remaining term of this Lease plus three (3) months beyond, then such Letter of Credit shall be extended or renewed at least ninety (90) days prior to its expiration.

All or any portion of the principal sum of the Letter of Credit shall be available unconditionally to Lessor for the purposes and uses provided herein. The bank, and the form and provisions of the Letter of Credit shall be acceptable to the Executive Director of Lessor, in his sole discretion, and if not so acceptable, may be rejected. The Letter of Credit and Drawing Certificate shall not be acceptable if it requires Lessor to send written notice of default or request or demand payment from Lessee after default, prior to Lessor drawing on any funds under the Letter of Credit.

Notwithstanding the above, if said security deposit or the cumulative total amount of security deposits required by Lessor under this Lease and other leases, permits and agreements between Lessor and Lessee does not exceed Twenty-Five Thousand Dollars (\$25,000), Lessee may elect to provide said security deposit in the form of cash.

The amount of the security deposit may be adjusted from time to time at the discretion of the Executive Director of Lessor. Following any such adjustment, the amount of the security deposit may not exceed the greater of: (i) three (3) months' flat rent, or (ii) the

annual average of three (3) months' percentage rent if this Lease provides for percentage rent. In the event the amount of the security deposit is increased, Lessee shall submit the additional security deposit within thirty (30) days of notification of the increase.

Lessee shall maintain the required security deposit continuously throughout the Lease term. Failure to do so shall be deemed a default and shall be grounds for immediate termination of this Lease in accordance with Paragraph 10 herein.

The security deposit or the remaining portion thereof, shall be rebated, released, assigned, surrendered, or endorsed to Lessee or order, as applicable, upon expiration or earlier termination of this Lease.

**48. DISPUTE RESOLUTION:** Except for (i) a dispute or disagreement as to the amount of rent that Lessee is to pay Lessor or (ii) a default in the payment of rent, all other disputes or disagreements between or among the parties arising out of or relating to the terms, conditions, interpretation, performance, default or any other aspect of this Lease, such parties shall first attempt to resolve the dispute informally. In the event the dispute is not resolved informally, prior to and as a precondition to the initiation of any legal action or proceeding, the parties shall refer the dispute to mediation before a retired State or Federal judge mutually selected by the parties. The dispute shall be mediated through informal, nonbinding joint conferences or separate caucuses with an impartial third party mediator who will seek to guide the parties to a consensual resolution of the dispute. The mediation proceeding shall be conducted within thirty (30) days (or any mutually agreed longer period) after referral, and shall continue until any party involved concludes, in good faith, that there is no reasonable possibility of resolving the dispute without resort to a legal action or proceeding. All costs of the mediation shall be shared equally by the parties involved. Each party shall bear its own attorneys' fees and other costs incurred in connection with the mediation. In the event the parties are unable to resolve the dispute through mediation, in addition to any other rights or remedies, any party may institute a legal action.

**49. REDEVELOPMENT OF THE PREMISES:** This Paragraph 49 addresses Lessee's obligations with respect to the redevelopment of the Premises for so long as SAN DIEGO CONVENTION CENTER CORPORATION, a non-profit public benefit corporation or Permitted Assignee (as defined in Paragraph 9 of this Lease) is the Lessee under this Lease. In the event of a transfer of this Lease to FIFTH AVENUE LANDING, LLC pursuant to Paragraph 9(h) of this Lease or an assignment to any other person or entity (other than Permitted Assignee) approved by Lessor in accordance with Paragraph 9 of this Lease, Paragraph 50 will govern Lessee's obligations with respect to the redevelopment of the Premises and this Paragraph 49 will have no further force or effect. Lessor and Lessee will cooperate diligently and in good faith to amend the Port Master Plan to permit the construction and operation of a project consisting of both an expansion to the San Diego Convention Center ("Expansion") and an adjacent hotel ("Expansion Hotel") in accordance with this Paragraph. The Expansion and Expansion Hotel will be located on those respective portions of the Leased Premises described in Exhibit "C" to this Lease and which will be referred to as the "Expansion Site" and "Expansion Hotel Site." The integrated Expansion and Expansion Hotel are collectively referred to as the "Project." Lessee understands the importance of the Expansion Hotel as a waterfront use and revenue source and further acknowledges that Lessor would not proceed with the entitlement of the Project



without the assurance that the Expansion Hotel will be an integral part of the Project and that Lessor will receive the rent stream from the Expansion Hotel.

- (a) Description of the Project. The Expansion will consist of: approximately 950,000 square feet of San Diego Convention Center Phase III expansion including approximately 49,400 gross square feet of ground level retail along the public promenade on the waterfront, including relocation of the water transportation center; two pedestrian bridges over Convention Way between the Expansion Hotel and the Expansion; a third pedestrian bridge over Harbor Drive; relocation and realignment of portions of Convention Way; and enhancement of vehicular and pedestrian access to the waterfront, Expansion Hotel and public parks along a realigned Convention Way and Marina Park Way. The Expansion Hotel will consist of a minimum of 250 and a maximum 500 rooms with banquet and conference rooms, ballroom, restaurants, cocktail lounges, approximately 50,000 square feet of retail shops, and related development. The Coastal Development Permit ("CDP") for the Project will provide that the Expansion Hotel will have access to: (I) the Convention Center's meeting rooms and banquet facilities in reasonable proximity to the Expansion Hotel at rates and other terms equal to those granted by Lessee to other hotel operators and (II) dedicated parking spaces in the Convention Center garage in a number sufficient to satisfy Lessor's standards for hotels, in accordance with the Management Agreement defined in Paragraph 49(h)(v), and subject to the final sentence of Paragraph 49 (h)(v). Lessor understands and acknowledges that Lessee has no control over whether or not the Management Agreement will be amended to permit the parking described in the preceding sentence and has not taken any position in opposition or support of any such amendment to the Management Agreement.
- (b) Entitlement Schedule. A schedule of all actions and approvals anticipated to be necessary for the entitlement of the Project through approval of a Port Master Plan Amendment by the California Coastal Commission ("CCC"), hereinafter referred to as "Entitlements," is attached as Exhibit "D" to this Lease (the "Entitlement Schedule"). Although Lessee and Lessor will exercise diligent and good faith efforts to expedite the Entitlement Schedule, Lessee acknowledges that the Entitlement Schedule represents Lessor's current, best estimate of the schedule for the processing, consideration and approval of Entitlements for the Integrated Expansion and Expansion Hotel by Lessor and California Coastal Commission. Lessee further acknowledges that Lessor may adjust the Entitlement Schedule to accommodate schedule changes resulting from (I) delays in the schedule for the processing and consideration of Entitlements including the filing and processing of administrative appeals of Entitlement approvals, (II) litigation of Entitlement approvals and other governmental actions necessary for the implementation of the Project and (III) the impact of market conditions on financing and ground leasing of components of the Project. Lessor will provide Lessee with prior written notice of all such adjustments to the Entitlement Schedule and Lessee hereby consents to such amendments that reflect the impact of the

causes described in the preceding sentence. Any and all adjustments to the Entitlement Schedule will not require an amendment to this Lease.

- (c) **Entitlement Costs.** The term "Entitlement Costs" shall mean all direct third party costs incurred by Lessor in the processing, consideration and approval of Entitlements for the Expansion and Expansion Hotel through the satisfaction of the conditions precedent described in Paragraphs 49(h)(i) and 49(h)(ii); provided, however, that third party costs shall not include the cost of outside attorneys and/or others hired to act as Lessor's representatives in negotiations with Lessee. Entitlement Costs will include, without limitation, costs incurred for the preparation and associated research for all required plans, studies, analyses, appraisals, reports and other work product by planning, design, financial, engineering and other consulting professionals regarding any aspect of the Project as determined by Lessor in its sole discretion ("Report(s)"). Prior to causing commencement of the preparation of a Report, Lessor will notify Lessee in writing of scope, purpose and estimated cost of the Report. Prior to incurring any Entitlement Costs, Lessor and Lessee will negotiate diligently and in good faith to determine what percentage of the Entitlement Costs relates to the Expansion and what percentage of the Entitlement Costs relates to the Expansion Hotel. In negotiating such percentages, the parties will consider such factors as the respective land and improvement areas of the Expansion and Expansion Hotel, existing entitlements in the current PMP relating to the Premises, the level of controversy associated with various components of the Project and whether such components are required by the Expansion versus the Expansion Hotel, the benefits to the Expansion Hotel (regardless of size) from its adjacency to the Expansion versus the hotel approved in the current PMP, added costs that may be incurred in seeking to expand the size of the Expansion Hotel above the hotel size specified in the current PMP, un reimbursed staff costs that will be incurred by Lessor in the Entitlement process and such other and further factors that the parties deem relevant. Upon completion of such negotiations and determination of such percentages, Lessor will pay the percentage of Entitlement Costs related to the Expansion Hotel ("Expansion Hotel Percentage") and Lessee will pay the percentage of Entitlement Costs related to the Expansion ("Expansion Percentage"). Lessee will pay the Expansion Percentage of the Entitlement Costs within thirty (30) days following Lessee's receipt of invoices for such costs from Lessor. Lessee will pay all direct third party costs incurred by Lessor in the processing, consideration and approval of Entitlements for the Integrated Expansion and Expansion Hotel including, without limitation, costs incurred for the preparation and associated research for all required plans, studies, analyses, appraisals, reports and other work product by planning, design, financial, engineering and other consulting professionals regarding any aspect of the Project as determined by Lessor in its sole discretion ("Report(s)") and will discuss these items with Lessee, upon request. Prior to incurring any financial obligation for the preparation of a Report, Lessor will notify Lessee in writing of scope, purpose and estimated cost of the Report.

Lessee will pay all costs described in this paragraph within thirty (30) days following Lessee's receipt of invoices for such costs from Lessor.

- (d) CEQA Compliance. If deemed necessary by the Lessor, an environmental impact report ("EIR") as defined in the California Environmental Quality Act ("CEQA") for the Project and a Port Master Plan Amendment ("PMPA") will be prepared by a private firm ("CEQA Consultant") selected by Lessor, in its sole discretion under an agreement ("Three-Party Agreement") in form and content as required by Lessor in its sole discretion executed by the Lessor, Lessee and the CEQA Consultant. The Three-Party Agreement will include the following provisions: (i) Lessee will pay the Expansion Percentage and Lessor will pay the Expansion Hotel Percentage of all costs incurred by Lessor in preparing the EIR and (ii) Lessor and Lessee will pay such costs directly to the CEQA Consultant as they are incurred within thirty (30) days after receipt of the CEQA Consultant's written request for payment. In the event of any conflict or inconsistency between the Three-Party Agreement actually executed by the parties hereto and the provisions in the preceding sentence, the provisions of the Three-Party Agreement shall govern and prevail. Notwithstanding the foregoing, Lessor, in its sole discretion, may elect to enter into a two-party agreement between Lessor and the CEQA Consultant and, in that event, Lessee agrees to pay the Expansion Percentage of Lessor's cost of preparing the EIR and will pay such costs as they are incurred within thirty (30) days after Lessee receives the Lessor's written request for payment. Notwithstanding the foregoing, Lessee may elect to select, hire and pay a CEQA consultant to prepare the EIR under a two-party agreement between Lessee and the CEQA Consultant. In that event, Lessor, in its sole discretion, may select and hire an independent third-party CEQA Consultant under a two-party agreement between Lessor and independent third-party CEQA Consultant to review the EIR for accuracy, completeness, and consistency with CEQA. Lessee agrees to pay the Expansion Percentage of Lessor's cost of the independent third-party CEQA Consultant and will pay such costs as they are incurred within thirty (30) days after Lessee receives the Lessor's written request for payment. Lessee will fully and timely cooperate with the Lessor and, if applicable, the CEQA Consultant in furnishing information required for the CEQA document and Lessor's efforts to obtain CCC certification, including Lessee's attendance and presentations at community workshops or other public forums where issues relating to the EIR and PMPA are discussed.
- (e) Required Submissions. No later than ninety (90) days following the date of this Lease, Lessee will submit a programmatic site development plan sufficient for a project level EIR that complies with (or proposes specific changes needed for the Project to comply with such Lessor document) Lessor's governing urban design, environmental and planning documents that may include but are not limited to:
- (i) Port Master Plan and Precise Plan, Planning District 3;

- (ii) South Embarcadero Redevelopment Program 2 (SERP2) EIR and Port Master Plan Amendment (PMPA);
- (iii) Findings of Fact for SERP2 EIR and PMPA;
- (iv) South Embarcadero Urban Design Guidelines, as amended;
- (v) Hilton Coastal Development Permit;
- (vi) San Diego Convention Center EIR;
- (vii) Findings of Fact for San Diego Convention Center Expansion and PMPA;
- (viii) South Embarcadero Phase 2 Public Access Plan;
- (ix) Coastal Commission Staff Report for Convention Center Hotel (Hilton) Project;
- (x) Coast Commission Staff Report for SERP 2 PMPA; and,
- (xi) Fifth Avenue Landing, LLC CDP for the water transportation center.

- (f) Reservation of Discretion. Lessee acknowledges and agrees that, notwithstanding the terms and conditions of this Lease, Lessor reserves its discretion to approve or disapprove all actions contemplated hereby which require by law the exercise of discretion and which Lessor cannot lawfully be committed to by contract (collectively, "Discretionary Actions") and that nothing in this Lease will be construed as circumventing or limiting the Lessor's discretion with respect to the environmental review required by CEQA. Such reservation of discretion will apply to all contemplated legislative and quasi-judicial actions including, without limitation, approval of land use entitlements, CEQA compliance, code enforcement and the making of findings and determinations required by law. Lessee further acknowledges and agrees that: (i) Lessor's Board of Port Commissioners ("Board") may, in its sole and absolute discretion, certify or not certify the Final EIR for the Project ("FEIR") and approve or not approve any aspect of the Project; and (ii) either the Board or the CCC may, in their sole and absolute discretion, elect not to approve, adopt or certify the PMPA or CDP based on the FEIR or other discretionary factors. Lessee further acknowledges and agrees that the Board's decision whether or not to certify the FEIR and its approval of the PMPA might be adopted or certified only upon the Board's adoption of certain additional conditions, mitigation measures or alternatives considered in the FEIR. Lessee accepts the risk that the Board or the CCC will not approve, adopt or certify the FEIR and the PMPA or CDP and the FEIR and the PMPA or CDP might be approved, adopted or certified subject to the selection of an alternative or the performance of certain additional conditions or mitigation measures imposed by Lessor or CCC in their sole and absolute discretion. Other than as expressly set forth in this Lease, or as provided in applicable law, Lessee will have no claim, cause of action, or right to compensation or reimbursement from Lessor or any other person if the FEIR is not certified by the Board or the PMPA or CDP is not adopted by Lessor or certified by the CCC for any reason, or if either the FEIR or the PMPA or CDP is adopted or certified subject to the selection of an alternative or the performance of certain additional conditions or mitigation measures. In the event that Lessor will take or fail to take any Discretionary Action with respect to the Project, (i) any such action or inaction will not constitute a breach of Lessor's obligations

under this Lease and (ii) Lessee will have no claim, cause of action, or right to compensation or reimbursement from Lessor or any other person.

- (g) Waterfront Urban Design, Sustainability and Environmental Guidelines. In recognition of the potential impacts the Expansion may have on the public realm and the environment surrounding the Leased Premises and in order to respect and improve public access and environmental conditions at the waterfront, Lessor and Lessee will meet and confer diligently and in good faith in a collaborative process, including public and stakeholder workshops (as per Exhibit "D"), to determine how to mitigate potential adverse impacts of the Project on the public realm and environment by adhering to the following guidelines ("Program Guidelines") in the design of the Project including, but not limited to:

- (i) Minimize adverse impacts resulting from bulk, massing and scale of the Expansion;
- (ii) Facilitate lateral movement of the public and activate the waterfront;
- (iii) Create and maintain market viability of the Project's retail along the waterfront;
- (iv) Maximize opportunities to co-locate pedestrian and vehicular access to Embarcadero Marina Park South and maintain the quality of that access;
- (v) Create and maintain viable public access to the Expansion Hotel site; and
- (vi) Maximize the market viability of the Expansion Hotel as an independent component of the Project.

- (h) Conditions Precedent to Exercise of Option. Exercise of the Option described in Paragraph 49(i) below will be subject to the satisfaction of the conditions precedent described below. Whenever used in this Paragraph to refer to an entitlement, the terms "approved" and "approval" will mean approval of the specified action and (i) termination of all applicable administrative appeal periods with respect to such action without the filing of an appeal, or if an appeal is filed, the denial of such appeal and (ii) if any legal challenge to the specified action is filed, such legal challenge has been dismissed or withdrawn. Lessor will not unreasonably withhold or delay the notices described in this Paragraph 49(h)

- (i) Project Approval and FEIR Certification. In the event the Lessor determines to certify the FEIR and to approve the PMPA in a form consistent with the Project as described in the FEIR, delivery to Lessee of Lessor's written notice that the Lessor has approved the Project by amending the Port Master Plan and certifying the FEIR consistent with the Project as described in the FEIR. Pursuant to Paragraph 49(f), above, Lessor, in its sole and absolute discretion, may or may not certify the FEIR and may or may not approve the Project by amending the Port Master Plan and may select any alternative, including the alternative of not going forward with the

Project, or adopt any mitigation measure or condition which it determines is necessary and appropriate in order to comply with CEQA or any other applicable law or regulation.

- (ii) CCC Approval. Delivery to Lessee of Lessor's written notice that the CCC has approved a PMPA consisting of both the Expansion and the Expansion Hotel as described in the FEIR.
- (iii) CDP Approval for Expansion. Delivery to Lessee of Lessor's written notice that Lessor has approved a Coastal Development Permit for the Expansion consistent with the PMPA.
- (iv) Approval of Lessee's Financing. Delivery to Lessee of Lessor's written notice that Lessor has approved Lessee's financing for the Expansion ("Expansion Financing"). In connection with such approval, when and only when Lessee has obtained approval from all funding sources and taxing authorities for all components of the Expansion Financing, Lessee will deliver to Lessor a detailed written description of the Expansion Financing along with evidence to the reasonable satisfaction of Lessor of the approval of funding from all funding sources and taxing authorities described in the Expansion Financing. Lessor will provide its written notice of its approval or disapproval of the Expansion Financing within ninety (90) days from its receipt of the foregoing submission and supporting materials.
- (v) Amendment of Management Agreement between Lessor and City. Delivery to Lessee of Lessor's written notice that Lessor and the City of San Diego have amended that certain 1998 Convention Center Management Agreement between Lessor and the City of San Diego, filed with the City Clerk's Office on November 25, 1997, as City of San Diego Document No. 00-18443-3, as amended (the "Management Agreement"), to provide that a number of dedicated parking spaces in the Convention Center parking garage, sufficient to comply with Lessor's then current parking requirements for the Expansion Hotel have been allotted to the Expansion Hotel in reasonable proximity to the Expansion Hotel. Lessor agrees that, to the extent the reallocation diminishes the 1,100 spaces currently allocated to the City under the Management Agreement for conventioner parking, Lessor shall provide replacement spaces in equal number in the District's Convention Center Hotel Garage (located at Park Blvd and Harbor Drive, adjacent to the Hilton hotel), in reasonable proximity to the Convention Center facility.
- (i) Expansion Option. Within sixty (60) days following the satisfaction of each of the conditions precedent described in Paragraph 49(h), Lessee will have the right, but not the obligation, to exercise the option to lease the Expansion Site (the "Expansion Option") by delivering to Lessor written notice of its intention to exercise the Expansion Option. The date of delivery of Lessee's written

notice to Lessor exercising the Expansion Option is hereinafter called the "Expansion Option Exercise Date." Upon Lessor's receipt of such notice, Lessor and Lessee will diligently and in good faith negotiate a lease agreement (the "Expansion Lease") based upon Lessor's then standard lease form and in accordance with the terms and conditions described in Exhibit "E" to this Lease, which shall include the relocation of the water transportation center. Within six (6) months following the Expansion Option Exercise Date, Lessor and Lessee will complete negotiations of, and the Board will consider approval of the Expansion Lease. Upon the execution and approval of the Expansion Lease, this Lease will terminate with respect to the entire Premises. The Expansion Lease will provide that the Expansion Hotel will have access to the Convention Center's meeting rooms and banquet facilities in reasonable proximity to the Expansion Hotel at rates and other terms equal to those granted by Lessee to other hotel operators.

- (j) Failure of Conditions Precedent or Non Exercise of Option. If the conditions precedent set forth in Paragraph 49(h) are not satisfied or if Lessee fails to timely exercise the Expansion Option for any reason, the Expansion Option will terminate and will be of no further force or effect.

**50. DEVELOPMENT OF HOTEL WITHOUT EXPANSION:** If the Expansion Option terminates for any reason, Lessee will develop a freestanding hotel without the Expansion ("Hotel") on the Premises in accordance with this Paragraph.

- (a) Description of Hotel. The Hotel will contain a number of hotel rooms equal to the maximum number of hotel rooms permitted under the then-current PMPA with banquet and conference rooms, ballroom, restaurants, cocktail lounges, retail shops, and related development on the entire Premises including parking in accordance with Lessor's published standards, a public park/plaza of approximately one acre, public promenade along the waterfront, pedestrian bridge(s), and a public observation terrace, and an interface with the existing water transportation center. If the then-current Port Master Plan limits development to fewer than 400 hotel rooms on the Premises, Lessor acknowledges that Lessee has agreed to Paragraph 50(j) with the understanding that Lessee will seek an amendment to the Port Master Plan to increase the maximum number of hotel rooms permitted on the Premises to a number greater than 400. The Hotel will meet or exceed the service quality standards of the Hilton San Diego Bayfront, San Diego Marriott Hotel & Marina and Manchester Grand Hyatt hotels. The Hotel may include 110 parking spaces in the Convention Center, subject to Lessor and City of San Diego amending the Management agreement to that effect.
- (b) Entitlement Processing. If an additional amendment to the then-current Port Master Plan is deemed necessary by Lessor, Lessor and Lessee will cooperate diligently and in good faith to amend the Port Master Plan to permit the construction and operation of the Hotel.

- (c) Entitlement Schedule. A schedule of the actions anticipated to be necessary for the entitlement of the Hotel (the "Hotel Entitlement Schedule") is attached as Exhibit "F" to this Lease. Lessee acknowledges that the Hotel Entitlement Schedule represents the Lessor's current, best estimate of the schedule for the processing and consideration of entitlement approvals for the Hotel by Lessor and CCC. Lessee further acknowledges that Lessor may adjust the Hotel Entitlement Schedule to accommodate schedule changes resulting from (i) delays in the schedule for the processing and consideration of entitlements including the filing and processing of administrative appeals of entitlement approvals, (ii) litigation of entitlement approvals and other governmental actions necessary for the implementation of the Project and (iii) the impact of market conditions on financing and ground leasing of components of the Hotel. Lessee hereby consents to future amendments to the Hotel Entitlement Schedule that reflect the impact of the causes described in the preceding sentence.
- (d) Entitlement Costs. Lessee will pay all direct costs incurred by Lessor in the processing, consideration and approval of Entitlements for the Hotel including, without limitation, costs incurred for the preparation and associated research for all required plans, studies, analyses, appraisals, reports and other work product by planning, design, financial, engineering and other consulting professionals regarding any aspect of the Project Hotel as determined by Lessor in its sole discretion ("Hotel Reports"). Prior to incurring any financial obligation for the preparation of a Hotel Report, Lessor will notify Lessee in writing of scope, purpose and estimated cost of the Hotel Report. Lessee will pay all costs described in this paragraph within thirty (30) days following Lessee's receipt of invoices for such costs from Lessor. If Lessee proposes a Hotel with more than 250 rooms and if Lessor (and CCC, if applicable) approves a CDP for a Hotel with more than 250 rooms, Lessee shall, within sixty (60) days following approval of the CDP, reimburse Lessor for the Expansion Hotel Percentage of Entitlement Costs incurred by Lessor pursuant to Paragraph 49(c) of this Lease in addition to the costs described above.
- (e) CEQA Compliance. Lessor will determine the type of environmental document ("Hotel Environmental Document") that is required for the Hotel by CEQA. If Lessor determines that the preparation of a Hotel Environmental Document is required, the Hotel Environmental Document and the PMPA will be prepared by a private firm ("Hotel CEQA Consultant") selected by Lessor, in its sole discretion under an agreement ("Hotel Three-Party Agreement") in form and content as required by Lessor in its sole discretion executed by the Lessor, Lessee and the Hotel CEQA Consultant. The Hotel Three-Party Agreement will include the following provisions: (i) Lessee agrees to pay all costs incurred by Lessor in the preparation of the Hotel Environmental Document and (ii) Lessee will directly pay to the Hotel CEQA Consultant such costs as they are incurred within thirty (30) days after Lessee receives the Hotel CEQA Consultant's written request for payment. In the event of any conflict or inconsistency between the Hotel Three-Party Agreement actually executed by



the parties hereto and the provisions in the preceding sentence, the provisions of the Hotel Three-Party Agreement shall govern and prevail. Lessee will fully and timely cooperate with the Lessor and, if applicable, the Hotel CEQA Consultant in furnishing information required for the CEQA document and Lessor's efforts to obtain CCC certification, including Lessee's attendance and presentations at community workshops or other public forums where issues relating to the Hotel EIR and PMPA are discussed.

- (f) **Required Submissions.** Commencing thirty (30) days following the date this Lease is transferred to FIFTH AVENUE LANDING, LLC (or its permitted assignee) pursuant to Paragraph 9(h) of this Lease, and continuing on the thirtieth (30<sup>th</sup>) day of each calendar quarter thereafter until June 30, 2020, Lessee, at its sole cost, shall cause PKF Consulting or such other hotel financial consulting firm approved by Lessor in its sole discretion ("Hotel Consultant") to deliver to Lessor a Quarterly RevPAR Report (defined below). Concurrent with delivery of the first Quarterly RevPAR Report, Lessee, at its sole cost, shall also cause Hotel Consultant to deliver to Lessor the Calendar Year 2007 RevPAR Certification. The term "Quarterly RevPAR Report" shall mean and refer to (i) a quarterly report issued by Hotel Consultant, (ii) applicable to the twelve-month period ending on the last day of the calendar quarter ending immediately prior to the calendar quarter in which the subject Quarterly RevPAR Report was issued, (iii) calculating the revenue per available room per day ("RevPAR") for the competitive set of Hotels described in Exhibit "G" ("Competitive Hotel Set") for the twelve-month period ending on the last day of such calendar quarter and (iv) certified to Lessor by Hotel Consultant to be true and correct. The term "Calendar Year 2007 RevPAR Certification" shall mean a letter addressed to Lessor, signed and certified to be true and correct by Hotel Consultant, identifying for Calendar Year 2007 the RevPAR for the Competitive Hotel Set. Lessor may request such other and further documentation and information reasonably required by Lessor to verify the conclusions contained in the Quarterly RevPAR Report and the Calendar Year 2007 RevPAR Certification and Lessee shall cause Hotel Consultant to comply with such requests. At the earliest possible date but no later than twelve (12) months following the date of issuance of the first Quarterly RevPAR Report which reflects a RevPAR greater than or equal to Calendar Year 2007 RevPAR for the Competitive Hotel Set contained in the Calendar Year 2007 RevPAR Certification, Lessee will submit a site development plan for the Hotel sufficient for a project level EIR that complies with the Lessor's governing urban design, environmental and planning documents that may include but are not limited to the items set forth below. If a Port Master Plan Amendment was approved to accommodate the Expansion and Expansion Hotel described in Paragraph 49 of this Lease, the entitlements required for development of Lessee's proposed site development plan may include a further Port Master Plan Amendment, as determined by Lessor in its sole discretion as further described below. For the avoidance of doubt, Lessee's right and obligation to submit a site development plan for the Hotel in accordance with this Paragraph 50(f) shall terminate on June 30, 2020.

- (i) Port Master Plan and Precise Plan, Planning District 3;
- (ii) South Embarcadero Redevelopment Program 2 (SERP2) EIR and Port Master Plan Amendment (PMPA);
- (iii) Findings of Fact for SERP2 EIR and PMPA;
- (iv) South Embarcadero Urban Design Guidelines, as amended;
- (v) Hilton Coastal Development Permit;
- (vi) San Diego Convention Center EIR;
- (vii) Findings of Fact for San Diego Convention Center Expansion and PMPA;
- (viii) South Embarcadero Phase 2 Public Access Plan; and
- (ix) Coastal Commission Staff Report for Convention Center Hotel (Hilton) Project;
- (x) Coastal Commission Staff Report for SERP 2 PMPA;
- (xi) Fifth Avenue Landing, LLC CDP for the water transportation center; and
- (xii) Any Port Master Plan Amendment approved pursuant to Paragraph 49 of this Lease.

- (g) Reservation of Discretion. Lessee acknowledges and agrees that, notwithstanding the terms and conditions of this Lease, Lessor reserves its discretion to approve or disapprove all Discretionary Actions with respect to the Hotel and that nothing in this Lease will be construed as circumventing or limiting the Lessor's discretion with respect to the environmental review required by CEQA. Such reservation of discretion will apply to all contemplated legislative and quasi-judicial actions including, without limitation, approval of land use entitlements, CEQA compliance, code enforcement and the making of findings and determinations required by law. Lessee further acknowledges and agrees that: (i) the Board may, in its sole and absolute discretion, certify or not certify the Hotel Environmental Document and approve or not approve any aspect of the Hotel; and (ii) either the Board or the CCC may, at their sole and absolute discretion, elect not to approve, adopt or certify the PMPA based on the Hotel Environmental Document or other discretionary factors. Lessee further acknowledges and agrees that the Board's decision whether or not to certify the Hotel Environmental Document and its approval of the PMPA might be adopted or certified only upon the Board's adoption of certain additional conditions, mitigation measures or alternatives considered in the Hotel Environmental Document. Lessee accepts the risk that the Board or the CCC may not approve, adopt or certify the Hotel Environmental Document and the PMPA and the Hotel Environmental Document and the PMPA might be approved, adopted or certified subject to the selection of an alternative or the performance of certain additional conditions or mitigation measures imposed by Lessor or CCC in their sole and absolute discretion. Other than as expressly set forth in this Lease, Lessee will have no claim, cause of action, or right to compensation or reimbursement from Lessor or any other person if the Hotel Environmental Document is not certified by the Board or the PMPA is not adopted by Lessor or certified by the CCC for any reason, or if either the Hotel Environmental Document or the PMPA is adopted or certified subject

to the selection of an alternative or the performance of certain additional conditions or mitigation measures. In the event that Lessor will take or fail to take any Discretionary Action with respect to the Project, (i) any such action or inaction will not constitute a breach of Lessor's obligations under this Lease and (ii) Lessee will have no claim, cause of action, or right to compensation or reimbursement from Lessor or any other person.

- (h) Hotel Option. In the event the Lessor determines to certify the Hotel Environmental Document, approve the PMPA in a form consistent with the Hotel Environmental Document and issue a CDP consistent with the Hotel Environmental Document, Lessor will deliver to Lessee Lessor's written notice ("Hotel Approval Notice") of such approvals. Pursuant to Paragraph 50(g), above, Lessor, in its sole and absolute discretion, may or may not certify the Hotel Environmental Document or may or may not approve the PMPA may select any alternative, including the alternative of not going forward with the Hotel, or may adopt any mitigation measure or condition which it determines is necessary and appropriate in order to comply with CEQA or any other applicable law or regulation. Within sixty (60) days following Lessee's receipt of the Hotel Approval Notice, Lessee will have the right, but not the obligation, to exercise the option to lease the Premises (the "Hotel Option") by delivering to Lessor written notice of its intention to exercise the Hotel Option. Upon Lessor's receipt of such notice and continuing for a period of ninety (90) days thereafter, Lessor and Lessee will diligently and in good faith negotiate a definitive lease agreement using Lessor's then-standard lease form in accordance with the terms and conditions described in Exhibit "H" to this Lease.
- (i) Termination of Lease upon Exercise of Hotel Option and Executing New Lease. If Lessee exercises the Hotel Option and executes a new lease for the Premises in accordance with Exhibit "H", the Lease will terminate and shall be of no further force or effect and all of Lessee's rights and obligations with respect to the Premises will be governed solely by the new lease.
- (j) Termination of Lease upon Lessee's Failure to Exercise Hotel Option. If Lessee fails to (i) timely submit a site development plan in accordance with Paragraph 50(f), (ii) timely exercise the Hotel Option upon receipt of a Hotel Approval Notice as described in Paragraph 50(h) or (iii) timely negotiate diligently and in good faith a definitive lease agreement in accordance with Paragraph 50(g), this Lease will terminate and all of Lessee's rights and obligations with respect to the Premises accruing after the date of termination of this Lease will terminate and will be of no further force or effect. Upon such termination, Lessee will immediately deliver to Lessor all plans, maps, studies, drawings, reports and other documents and information in Lessee's possession regarding the Hotel proposed for the Premises, without any fee or cost to Lessor.

**MEMORANDUM OF LEASE**

51. **MEMORANDUM OF LEASE:** This is the final Paragraph and Memorandum of Lease, hereinafter "Memorandum," dated April 6, 2010 between SAN DIEGO UNIFIED PORT DISTRICT, Lessor, and SAN DIEGO CONVENTION CENTER CORPORATION, Lessee, concerning the Leased Premises described in Exhibits "A" and "B," attached hereto and by this reference made a part hereof.

For good and adequate consideration, Lessor leases the Leased Premises to Lessee, and Lessee hires them from Lessor, for the term and on the provisions contained in the Lease dated July 1, 1984 20, including without limitation provisions prohibiting assignment, subleasing, and encumbering said leasehold without the express written consent of Lessor in each instance, all as more specifically set forth in said Lease, which said Lease is incorporated in this Memorandum by this reference.

The term is forty (40) years, beginning July 1, 1984 and ending June 30, 2024

This Memorandum is not a complete summary of the Lease. Provisions in this Memorandum shall not be used in interpreting the Lease provisions. In the event of conflict between this Memorandum and other parts of the Lease, the other parts shall control. Execution hereof constitutes execution of the Lease itself.

Port Attorney

SAN DIEGO UNIFIED PORT DISTRICT

By 

DEPUTY PORT ATTORNEY

By   
Director, Real Estate

SAN DIEGO CONVENTION CENTER  
CORPORATION

By   
Signature

PRINT NAME: CAROL WALLACE

PRINT TITLE: PRES & CEO

## **GUARANTY**

RAYMOND CARPENTER, ARTHUR ENGEL, HERBERT ENGEL and DAVID ENGEL, hereinafter "Guarantor," whose address is 1311 First Street Coronado, CA , as a material inducement to and in consideration of the SAN DIEGO UNIFIED PORT DISTRICT, hereinafter "Lessor," entering into a written Lease, hereinafter "the Lease" with SAN DIEGO CONVENTION CENTER CORPORATION, hereinafter "Lessee," dated the same date as this Guaranty, pursuant to which Lessor leased to Lessee, and Lessee leased from Lessor, premises located in the city of San Diego, County of San Diego, California, in accordance with the Lease on file in the Office of the Clerk of Lessor, Document No. 56486 attached to this Guaranty, and made a part of it, unconditionally guarantees and promises to and for the benefit of Lessor, that Lessee shall perform the provisions of the Lease for which it is responsible.

If Guarantor is more than one person, Guarantor's obligations are joint and several, and are independent of Lessee's obligations. A separate action may be brought or prosecuted against any Guarantor, whether the action is brought or prosecuted against any other Guarantor, Lessee, or all, or whether any other Guarantor, Lessee, or all are joined in the action.

Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this Guaranty.

The provisions of the Lease may be changed by agreement between Lessor and Lessee at any time, without the consent of or without notice to Guarantor. The Guarantor shall guaranty the performance of the Lease, as changed. Assignment of the Lease (as permitted by the Lease) shall not affect this Guaranty. Lessor's failure or delay in the enforcement of any of its rights also shall not affect this Guaranty.

If Lessee defaults under the Lease, Lessor can proceed immediately against Guarantor, Lessee, or both, or Lessor can enforce against Guarantor, Lessee, or both, any rights that it has under the Lease or pursuant to applicable laws. If the Lease terminates and Lessor has any rights it can enforce against Lessee after termination, Lessor can enforce those rights against Guarantor without giving prior notice to Lessee, Guarantor, or both, or without making any demand on either of them.

Guarantor waives the right to require Lessor to: (1) proceed against Lessee; (2) proceed against or exhaust any security that Lessor holds from Lessee; or (3) pursue any other remedy in Lessor's power. Guarantor waives any defense by reason of any disability of Lessee, and waives any other defense based on the termination of Lessee's ability from any cause.

Until all Lessee's obligations under the Lease have been discharged in full, Guarantor has no right of subrogation against Lessee. Guarantor waives: (1) its right to enforce any

remedies that Lessor now has, or later may have, against Lessee; (ii) any right to participate in any security now or later held by Lessor; (iii) all presentments, demand for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, and notices of acceptance of this Guaranty; and (iv) all notices of the existence, creation, or incurrence of new or additional obligations.

If Lessor is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay Lessor all costs incurred, including but not limited to reasonable attorney fees.

Guarantor's obligations under this Guaranty shall be binding on any successor of Guarantor. As used herein, a successor of Guarantor shall mean any assignee, transferee, personal representative, heir, or other person or entity succeeding lawfully, and pursuant to the provisions of said Lease, to the rights or obligations of Guarantor. Also as used herein, Lessor shall mean Lessor's successors and assigns, if any.

This Guaranty shall only be effective up to such time as the aforementioned Lease terminates.

RAYMOND CARPENTER

DATED: 4-26, 2010

Signature: Ray Carpenter

ARTHUR ENGEL

DATED: 4-26, 2010

Signature: Arthur Engel

DAVID ENGEL

DATED: 4-26, 2010

Signature: David Engel

HERBERT ENGEL

DATED: 4-26, 2010

Signature: Herbert Engel

(FOR USE BY SAN DIEGO UNIFIED PORT DISTRICT)

STATE OF CALIFORNIA)

COUNTY OF SAN DIEGO)

On May 6, 2010 before me, Ralph M. Carpio, Notary Public, personally appeared Karen J. Waymann, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within Instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature [Signature] (Seal)

OPTIONAL

Though the information below is not required by law, it may prove valuable to person relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Amended, Restated and Combined Lease

Document Date: April 6, 2010 Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: Carol Wallace

Capacity(ies) Claimed by Signer(s)

Signer's Name \_\_\_\_\_

- ☐ Individual  
☐ Corporate Officer - Title(s): \_\_\_\_\_  
☐ Partner - ☐ Limited ☐ General  
☐ Attorney in Fact  
☐ Trustee  
☐ Guardian or Conservator  
☐ Other: \_\_\_\_\_

Signer is Representing: \_\_\_\_\_

NOTARY PUBLIC  
OF CALIFORNIA

Top of thumb here

Signer's Name \_\_\_\_\_

- ☐ Individual  
☐ Corporate Officer - Title(s): \_\_\_\_\_  
☐ Partner - ☐ Limited ☐ General  
☐ Attorney in Fact  
☐ Trustee  
☐ Guardian or Conservator  
☐ Other: \_\_\_\_\_

Signer is Representing: \_\_\_\_\_

NOTARY PUBLIC  
OF CALIFORNIA

Top of thumb here

(FOR USE BY GUARANTOR)

(STATE OF CALIFORNIA)

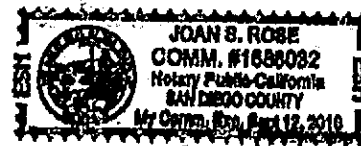
(COUNTY OF SAN DIEGO)

On 4.26.10 before me, Joan S. Rose, Notary  
Public, personally appeared Raymond A. Carpenter  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)  
is/are subscribed to the within instrument and acknowledged to me that he/she/they executed  
the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the  
instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the  
instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

*Joan S. Rose*



OPTIONAL

Though the information below is not required by law, it may prove valuable to the person(s) relying on the document  
and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

Capacity(ies) Claimed by Signer(s)

<p>Signer's Name _____</p> <p><input type="checkbox"/> Individual</p> <p><input type="checkbox"/> Corporate Officer - Title(s): _____</p> <p><input type="checkbox"/> Partner -- <input type="checkbox"/> Limited <input type="checkbox"/> General</p> <p><input type="checkbox"/> Attorney in Fact</p> <p><input type="checkbox"/> Trustee</p> <p><input type="checkbox"/> Guardian or Conservator</p> <p><input type="checkbox"/> Other: _____</p> <p>Signer is Representing: _____</p>	<p>Signer's Name _____</p> <p><input type="checkbox"/> Individual</p> <p><input type="checkbox"/> Corporate Officer - Title(s): _____</p> <p><input type="checkbox"/> Partner -- <input type="checkbox"/> Limited <input type="checkbox"/> General</p> <p><input type="checkbox"/> Attorney in Fact</p> <p><input type="checkbox"/> Trustee</p> <p><input type="checkbox"/> Guardian or Conservator</p> <p><input type="checkbox"/> Other: _____</p> <p>Signer is Representing: _____</p>
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(FOR USE BY GUARANTOR)

(STATE OF CALIFORNIA)

(COUNTY OF SAN DIEGO)

On APRIL 26, 2010 before me, CHRISTOPHER H. COOK, Notary Public, personally appeared ARTHUR E. ENGEL, HERBERT G. ENGEL & DAVID R. ENGEL who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



*Christopher H. Cook*

OPTIONAL

Though the information below is not required by law, it may prove valuable to the person(s) relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document / Title or Type of Document: SDUPD AMENDED, RESTATED  
COMBINED LEASE TO SDCCC

Document Date: \_\_\_\_\_ Number of Pages: 68

Signer(s) Other Than Named Above: RAY CARPENTER

Capacity(ies) Claimed by Signer(s)

<b>Signer's Name</b> _____ <input type="checkbox"/> Individual <input type="checkbox"/> Corporate Officer - Title(s): _____ <input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General <input type="checkbox"/> Attorney in Fact <input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator <input type="checkbox"/> Other: _____ Signer is Representing: _____ _____ _____	<b>Signer's Name</b> _____ <input type="checkbox"/> Individual <input type="checkbox"/> Corporate Officer - Title(s): _____ <input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General <input type="checkbox"/> Attorney in Fact <input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator <input type="checkbox"/> Other: _____ Signer is Representing: _____ _____ _____
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**EXHIBIT "A"**

**Lease Description for  
SAN DIEGO CONVENTION CENTER CORPORATION  
TIDELAND LEASE  
Parcel / Drawing No 049-083  
Within Corporate Limits of San Diego**

All that certain portion of land conveyed to the San Diego Unified Port District by that certain Act of Legislature of the State of California pursuant to Chapter 87, Statutes of 1962, First Extraordinary Session, as amended, and delineated on that certain Miscellaneous Map No. 564, filed in the Office of the San Diego County Recorder on May 28, 1978, File No. 76-184888, in the City of San Diego, County of San Diego, State of California, and more particularly described as follows:

**PARCEL NO. 1 (Land Area)**

Commencing at a 3" diameter brass disk monument stamped S.D.U.P.D. No. 14 as shown on R.O.S. No. 18888, filed in the Office of the County Recorder of San Diego County July 25, 2000; thence leaving said monument South 39°31'53" East a distance of 74.69 feet (calculated) to the TRUE POINT OF BEGINNING of Parcel No. 1, said point also being the beginning of a non-tangent 558.00 foot radius curve, concave to the north, a radial to said point bears South 00°22'28" East from the center of said curve; thence easterly along the arc of said curve through a central angle of 04°42'58" an arc distance of 46.77 feet to a point of reverse curvature, the common radial of which bears South 05°05'26" East from the center of said curve; thence southeasterly along the arc of a 32.00 foot radius curve concave to the southwest through a central angle of 44°48'18" an arc distance of 25.00 feet to a point on the southwesterly face of curb of a street commonly known as Convention Way; thence along said face of curb line South 50°19'08" East a distance of 427.68 feet to a point hereinafter known as Point "A"; thence leaving said face of curb line South 39°40'52" West a distance of 83.00 feet; thence South 50°19'08" East a distance of 112.62 feet; thence South 39°40'52" West a distance of 110.00 feet to a point on the U.S. Bulkhead Line as said U.S. Bulkhead Line is now established for the Bay of San Diego and delineated on map entitled "Harbor Lines, San Diego Bay, California File No. (D.O. series) 426" approved by the Secretary of the Army, April 28, 1963, and filed in the Office of the District Engineer, Los Angeles, California; thence leaving said U.S. Bulkhead Line and continuing South 39°40'52" West a distance of 1.00 foot; thence parallel with said U.S. Bulkhead Line North 50°19'08" West a distance of 297.61 feet; thence South 39°40'52" West a distance of 1.00 foot; thence parallel with said U.S. Bulkhead Line North 50°19'08" West a distance of 179.41 feet; thence South 39°40'52" West a distance of 188.00 feet; thence North 50°19'08" West a distance of 177.32 feet to a point on the southeasterly face of curb line of a street commonly known as Marina Park Way; thence along said face of curb line North 39°40'52" East a distance of 200.00 feet to a point on said U.S. Bulkhead Line; thence leaving said U.S. Bulkhead Line and continuing along said face of curb North 39°40'52" East a distance of 28.85 feet to the beginning of a 162.00 foot radius curve, concave to

**EXHIBIT "A"**

the southeast; thence northeasterly along the arc of said curve through a central angle of 49°58'40" an arc distance of 141.21 feet to the TRUE POINT OF BEGINNING of Parcel No. 1, containing 147,642 square feet or 3.39 acres of tidelands area.

**PARCEL NO. 2** (Land Area)

Commencing at the above described Point "A"; thence continuing along said Convention Way face of curb South 50°19'08" East a distance of 198.62 feet to the TRUE POINT OF BEGINNING of Parcel No. 2; thence continuing along said face of curb South 50°19'08" East a distance of 235.00 feet; thence leaving said face of curb South 39°40'52" West a distance of 193.00 feet to the above mentioned U.S. Bulkhead Line; thence leaving said U.S. Bulkhead Line and continuing South 39°40'52" West a distance of 1.00 feet; thence parallel with said U.S. Bulkhead Line North 50°19'08" West a distance of 235.00 feet; thence North 39°40'52" East a distance of 1.00 feet to said U.S. Bulkhead Line; thence leaving said U.S. Bulkhead Line and continuing North 39°40'52" East a distance of 193.00 feet to the TRUE POINT OF BEGINNING of Parcel No. 2, containing 45,590 square feet or 1.05 acres of tidelands area.

ALSO: Reserving therefrom a City of San Diego Water easement 15.00 feet in width lying within Parcel No. 1 as delineated and described as Easement No. 2 on sheets 2 and 4 of Drawing 019-063.

ALSO: Reserving therefrom a City of San Diego Storm Drain easement 20.00 feet in width lying within Parcel No. 1 as delineated and described as Easement No. 3 on sheets 2 and 4 of Drawing 019-063.

ALSO: Reserving therefrom an easement for Public Pedestrian Access 25.00 feet in width lying within Parcel No.'s 1 and 2 as delineated and described as Easement No. 4 on sheets 2 and 4 of Drawing 019-063.

ALSO: Reserving therefrom a City of San Diego Water easement 30.00 feet in width as shown On City of San Diego Dwg. No. 11558-36-D and lying within Parcel No.'s 1 and 2 as delineated and described as Easement No. 5 on sheets 2 and 4 of Drawing 019-063.

ALSO: Reserving therefrom a City of San Diego Storm Drain easement 30.00 feet in width lying within Parcel No. 1 as delineated and described as Easement No. 6 on sheets 2 and 4 of Drawing 019-063.


ALSO: Reserving therefrom an easement for Public Pedestrian Access 24.00 feet in width lying within Parcel No. 2 as delineated and described as Easement No. 8 on sheets 2 and 4 of Drawing 019-063.

ALSO: Reserving therefrom a Public Pedestrian Access easement 35.00 feet in width lying within Parcel No.'s 1 and 2 as delineated and described as Easement No. 9 on sheets 2 and 4 of Drawing 019-063.

EXHIBIT "A"

The above described tidelands lease and reservation areas are those delineated on San Diego Unified Port District Drawing No. 019-083 dated 18 March 2010, and made a part of this agreement.

All bearings and distances in the above legal description are grid, and based upon the California Coordinate System, Zone 6, N.A.D. 83, Epoch 1981.35.

 3-18-2010  
\_\_\_\_\_  
Gary L. Hua Date  
L.S. 7018



# EXHIBIT "B"

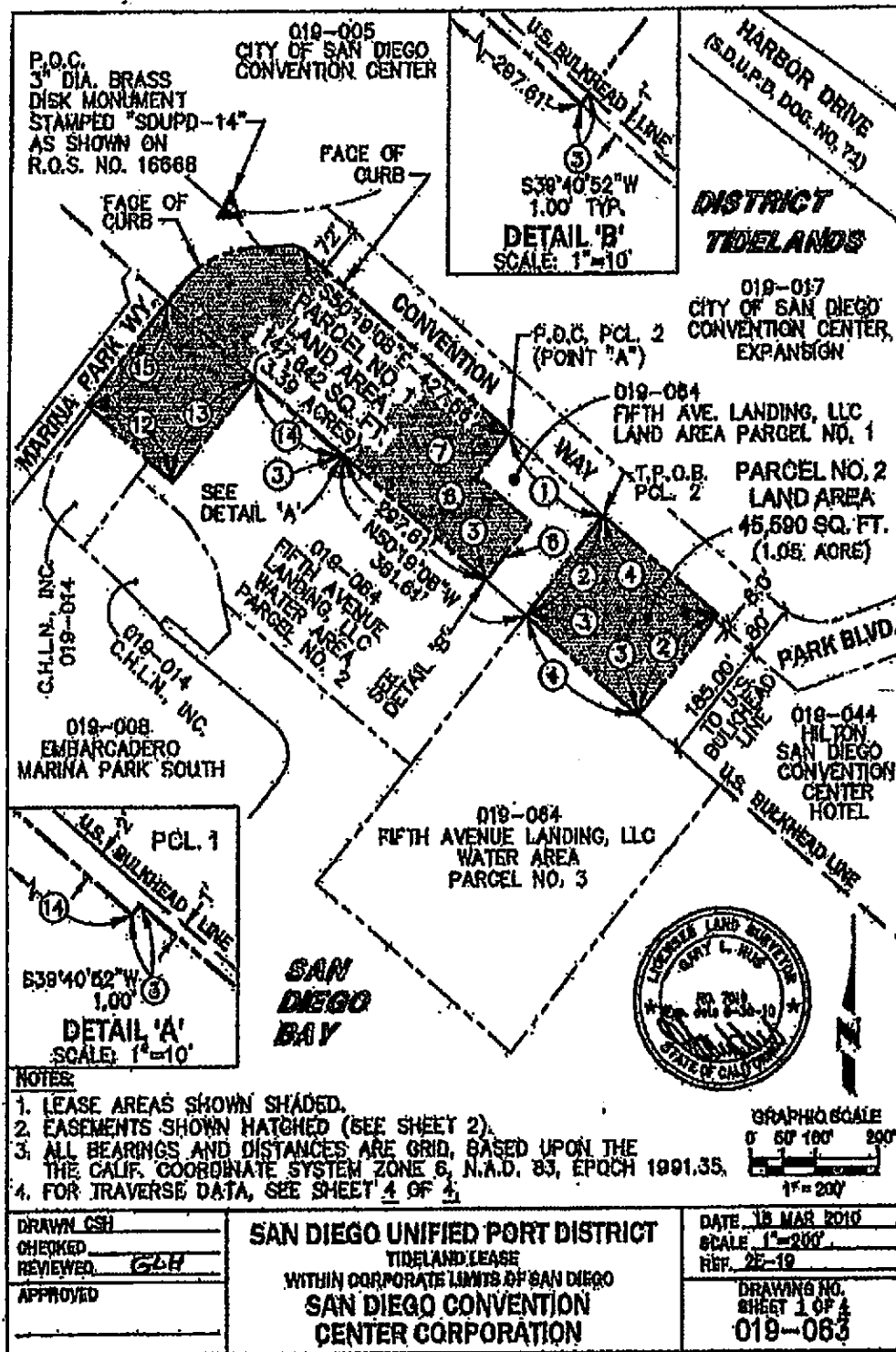
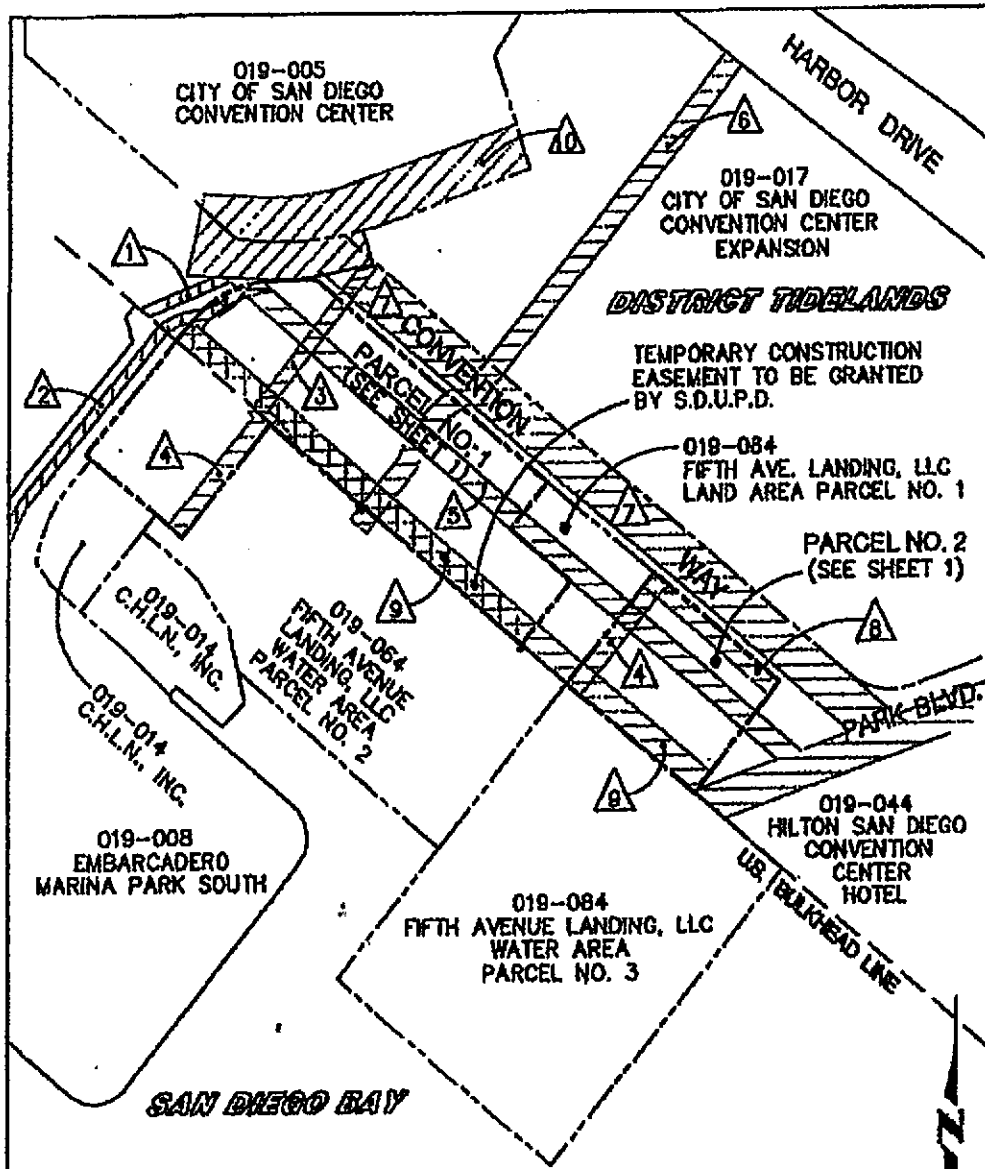


EXHIBIT "B"



EASEMENTS

NOTE:

FOR EASEMENT DESCRIPTION SEE SHEET 4 OF 4



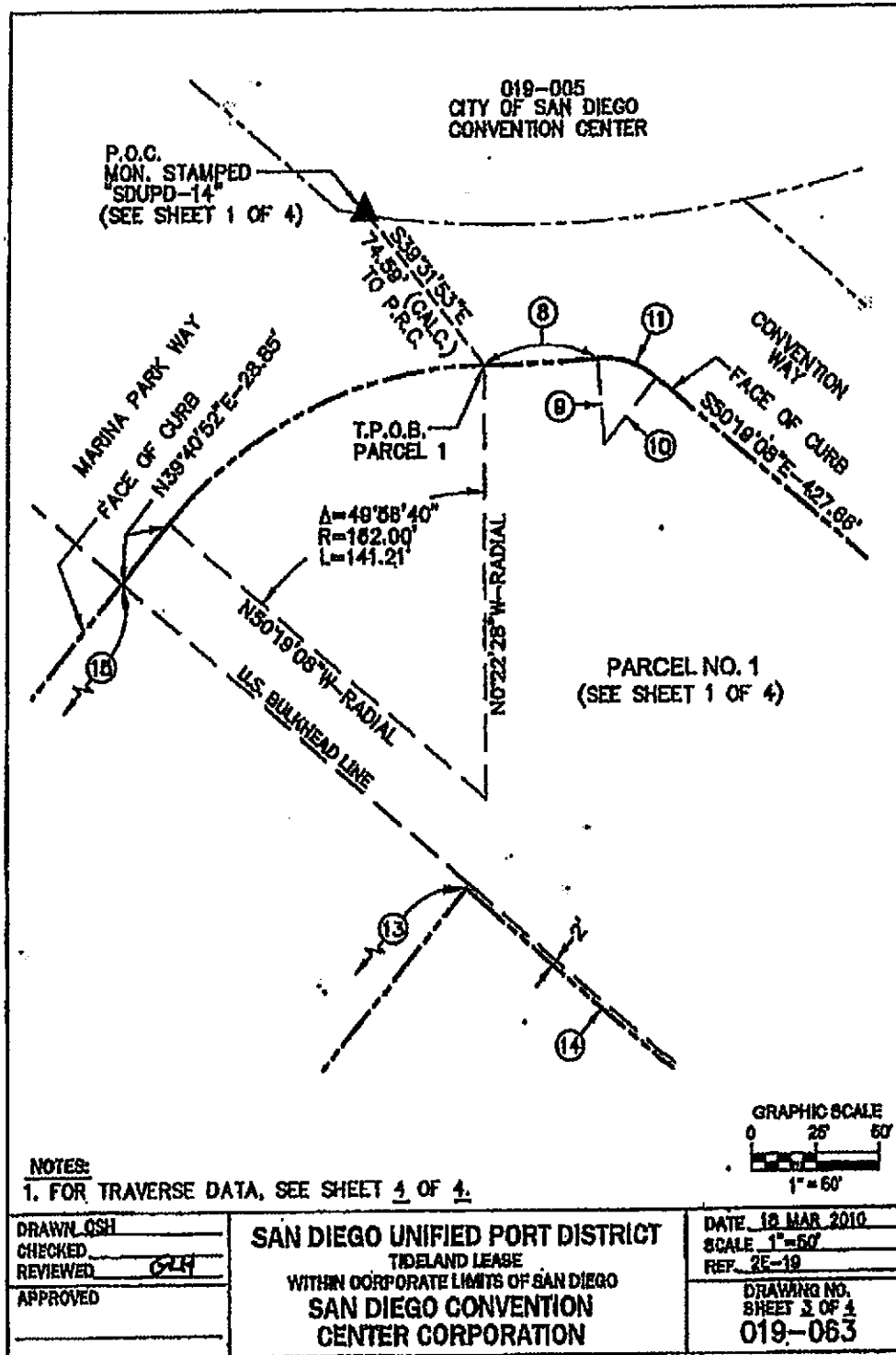
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SAN DIEGO UNIFIED PORT DISTRICT  
TIDELAND LEASE  
WITHIN CORPORATE LIMITS OF SAN DIEGO  
SAN DIEGO CONVENTION  
CENTER CORPORATION

DATE 18 MAR 2010  
SCALE 1" = 200'  
REF. 2E-19  
DRAWING NO.  
SHEET 2 OF 4  
019-069

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# EXHIBIT "B"



# EXHIBIT "B"

## TRAVERSE DATA

- |                       |                       |
|-----------------------|-----------------------|
| ① S50°19'08"E-196.62' | ⑪ Δ=44°46'18"         |
| ② S39°40'52"W-193.00' | R=32.00'              |
| ③ S39°40'52"W-1.00'   | L=25.00'              |
| ④ S50°19'08"E-235.00' | ⑫ N50°19'08"W-177.32' |
| ⑤ S39°40'52"W-110.00' | ⑬ S39°40'52"W-198.00' |
| ⑥ S50°19'08"E-112.62' | ⑭ N50°19'08"W-179.41' |
| ⑦ S39°40'52"W-83.00'  | ⑮ N39°40'52"E-200.00' |
| ⑧ Δ=4°42'58"          |                       |
| R=556.00'             |                       |
| L=45.77'              |                       |
| ⑨ N5°05'28"W-RADIAL   |                       |
| ⑩ N39°40'52"E-RADIAL  |                       |

## EASEMENT DATA

- ① 15.00' CITY OF SAN DIEGO STORM DRAIN ESMT. SDUPD DWG. NO. 519-025 EXIST.
- ② 15.00' CITY OF SAN DIEGO WATER ESMT. 519-034 EXIST.
- ③ 20.00' CITY OF SAN DIEGO STORM DRAIN ESMT. SDUPD DWG. NO. 519-005 EXIST.
- ④ 25.00' PUBLIC PEDESTRIAN ACCESS ESMT.
- ⑤ 30.00' CITY OF SAN DIEGO WATER ESMT. S.D.U.P.D. DWG. NO. 519-031 EXIST.
- ⑥ 30.00' CITY OF SAN DIEGO STORM DRAIN ESMT. EXIST.
- ⑦ 60.00' CITY OF SAN DIEGO GEN. UTIL. ESMT. EXIST.
- ⑧ 24.00' PUBLIC PEDESTRIAN ACCESS ESMT.
- ⑨ 35.00' PUBLIC PEDESTRIAN ACCESS ESMT.
- ⑩ CITY OF SAN DIEGO GENERAL UTILITY EASEMENT 519-030 EXIST.

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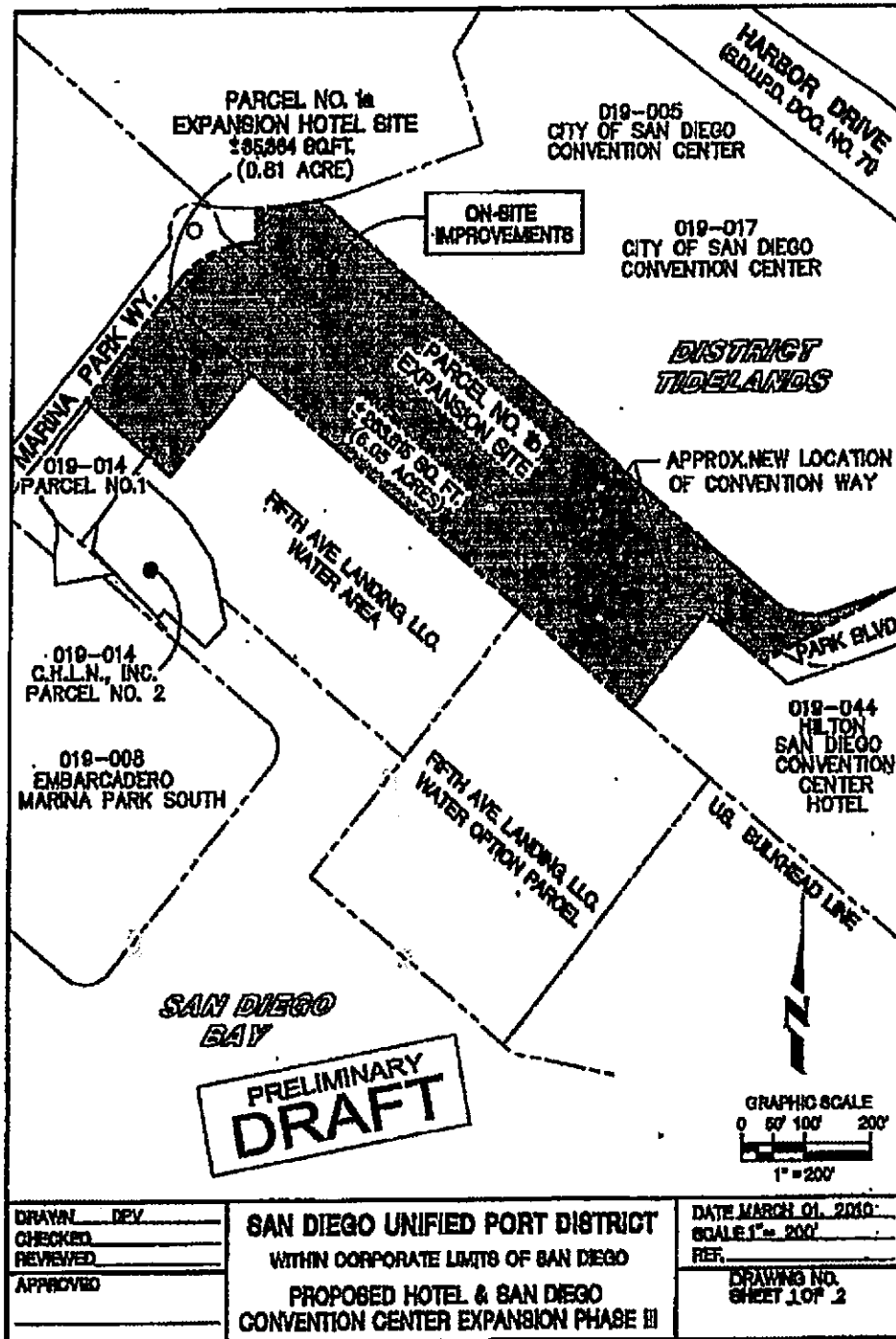
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 TIDELAND LEASE  
 WITHIN CORPORATE LIMITS OF SAN DIEGO  
**SAN DIEGO CONVENTION**  
**CENTER CORPORATION**

DATE 18 MAR 2010  
 SCALE  
 REP. 2E-19  
 DRAWING NO.  
 SHEET 4 OF 4  
 019-063

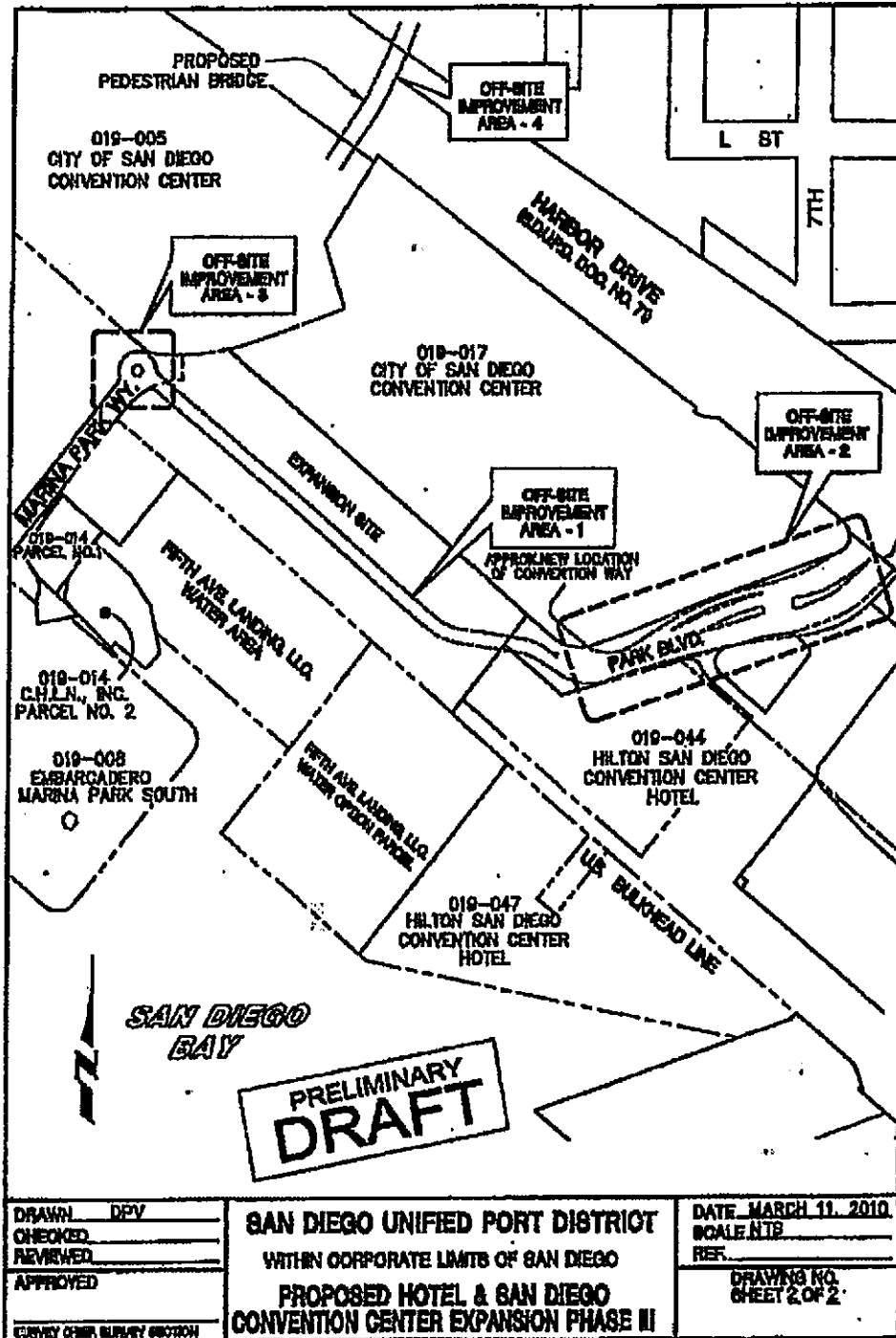
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# EXHIBIT C



# EXHIBIT C



**EXHIBIT D**  
**HOTEL & EXPANSION ENTITLEMENT SCHEDULE**  
**"Dates to be Determined"**

1. Completed Project Description and Environmental Application (EA) completed = Start of Environmental Review Process
2. Request for Proposals process for Environmental Impact Report (EIR) consultant
3. Board of Port Commissioners (BPC) for consultant selection and three party agreement (consultant, Port, and SDCCC)
- 3a. EIR preparation process, public and stakeholder workshops.
4. BPC hearing on EIR and PMPA.
5. Submission of PMPA package to California Coastal Commission (CCC) and schedule hearing
6. CCC certification hearing on PMPA.
7. SDCCC submits complete application to District for Coastal Development Permit for Expansion, consistent with approved PMPA and EIR.
8. Board of Port Commissioners considers issuance of Coastal Development Permit for Expansion.

**Estimated Total [assuming no legal challenges, no extended public review, no negotiation periods, and no changes to the project description that alters analysis needs] = 28 months (public and stakeholder outreach and workshops to be held throughout process)**

## **EXHIBIT E**

### **EXPANSION LEASE TERM SHEET**

- 1. Parties:** San Diego Unified Port District ("District") and San Diego Convention Center Corporation ("SDCCC") or the City of San Diego as Permitted Assignee defined in the Amended, Restated and Combined Lease between the District and SDCCC, dated as of April 6, 2010 ("ARC Lease"). SDCCC and Permitted Assignee (if applicable) are hereinafter called "Lessee."
- 2. Premises:** Approximately 6 acres of tidelands, located bay ward of the convention center between Marina Park Way and Park Boulevard, subject to hotel and public access rights on realigned Convention Way as depicted in Exhibit E, Sheets 2 & 3.
- 3. Project:** Development of approximately 850,000 square feet of San Diego Convention Center Phase III expansion including approximately 49,400 square feet of ground level retail along the public promenade; and two pedestrian bridges over Convention Way between the hotel and the expansion; a third pedestrian bridge over Harbor Drive; Relocation and realignment of portions of Convention Way; and creation of a traffic circle at Convention Way and Marina Park Way.
- 4. Revenue Projections:** Lessee will provide revenue projections for the Phase III expansion for up to 10 years.
- 5. Lease Grant:** The parties will negotiate a lease for the Premises to Lessee ("Lease") subject to the conditions being satisfactorily completed by Lessee. The lease document will be the District's standard lease document in effect as of the Expansion Option Exercise Date as defined in paragraph 49(i) of the ARC Lease.
- 6. Lease Conditions:** The following Lease conditions will be completed by Lessee, prior to grant of Lease at the District's sole discretion:

  - Public Outreach
  - Economic Feasibility Study
  - Conceptual Development Plans
  - Preliminary Plans
  - Working Drawings
  - Schematic Plans
  - Development Permits

- Equity Commitment
- Project Financing
- Management Agreement
- Equal Opportunity Program
- Performance Bond
- Construction Contract
- Completion Guaranty
- Lease Security Deposit
- Lease Guaranty

**7. Lease Uses:**

The Premises shall be used solely and exclusively for convention center uses and retail uses and for no other purposes whatsoever. This restriction on use of the Premises absolutely prohibits a change in use without the consent of the District.

**8. Lease Term:**

Sixty-six (66) years.

**9A. Minimum Rent:  
(First Term)**

With respect to all retail uses on the Premises, Lessee will pay minimum vs. percentage rent in accordance with Lessor's policies and procedures in effect on the effective date of the Lease.

With respect to the balance of the Premises on which Lessee's convention center operations are conducted, commencing on the effective date of the Lease and continuing until the earlier of (i) the thirtieth (30<sup>th</sup>) anniversary of the effective date of the Lease or (ii) the end of the initial amortization period of the bond(s) or other financial instrument(s) issued to finance construction of the Expansion, whether or not such bond(s) or other financial instrument(s) are subsequently repaid ahead of schedule or refinanced by new bond(s) or other financial instrument(s) (said time period is hereinafter called "First Term"), Lessee will pay annual minimum rent in accordance with this Paragraph 9A. Neither the prepayment nor the refinancing of such bond(s) or other financial instrument(s) shall either accelerate or extend the First Term for the purposes of this Section 9A.

- a. First Term rent will be determined by a market rate appraisal of the Premises prepared in accordance with Lessor's then current policies and procedures and which excludes both percentage rents for retail and all anticipated and historic revenues from Convention Center operations. Rent so determined will remain even throughout the First Term.

- b. During the First Term, Lessee will pay rent on a quarterly basis. Each payment of rent will be accompanied by a written itemization of Qualified Expenses that total an amount equal or greater than the rent payment.

"Qualified Expenses" will mean normal and customary expenses incurred by SDCCC and approved by Lessor, consistent with applicable law that directly benefit the Tidelands. For the avoidance of doubt, it is acknowledged that Qualified Expenses may include, without limitation, costs incurred to maintain the Convention Center (including Phases I and II as well as the Expansion); provided, however, Qualified Expenses will not include costs incurred in connection with dewatering the Convention Center site. For the purposes of this paragraph, SDCCC will be deemed to have incurred a Qualified Expense when it has incurred liability for the Qualified Expense.

- c. Within ten (10) business days following Lessor's receipt of each rent payment during the First Term and Lessee's written itemization of Qualified Expenses greater than or equal to the rent payment, Lessor will pay Lessee an amount equal to the rent payment.
- d. For the avoidance of doubt, Lessor and Lessee understand and acknowledge that: (i) in no case will rent ever exceed the sum of Qualified Expenses for the applicable period; (ii) the rent payment mechanism set forth in this Paragraph 9A is intended to assure the timely payment of funds for Qualified Expenses from Lessor to Lessee in an amount exactly equal to each payment of First Term rent; and (iii) this Paragraph 9A will be liberally construed to achieve that result throughout the First Term and represents Lessor's contribution to the financing of the Expansion.

**9B. Minimum Rent  
(Second Term):**

With respect to all retail uses on the Premises, Lessee will pay minimum vs. percentage rent in accordance with Lessor's policies and procedures in effect on the effective date of the Lease.

With respect to the balance of the Premises on which Lessee's convention center operations are conducted, commencing on the first day following expiration of the First Term and continuing until the expiration of the Term of the Lease (said time period is hereinafter referred to as "Second Term"),

Lessee will pay rent in accordance with this Paragraph 9B.

a. At least ninety (90) days prior to the end of the First Term, Lessor will deliver to Lessee in writing, its preliminary determination of initial annual rent for the Second Term of the Lease and identify, with specificity, the justification for its determination. In reaching its preliminary determination of initial annual rent for the Second Term, Lessor will consider the following:

i. A market rate appraisal of the Premises prepared in accordance with Lessor's then current policies and procedures which excludes both percentage rents for retail and all anticipated and historic revenues from Convention Center operations.

ii. That, other than retail located thereon, the Premises will be used exclusively for the Expansion as part of the existing Convention Center Phases I and II located on adjacent property. As such, the Expansion will be managed and operated under a common management agreement with Phases I and II.

iii. That SDCCC is a non-profit public benefit corporation which operates at a slight loss, requiring an annual subsidy from the City, for the purpose of attracting convention business to the City, including the tidelands, for the benefit of the City, Lessor and others.

iv. Potential increases in percentage rents that Lessor may receive from nearby businesses on the surrounding tidelands properties as well as other potential benefits, of the sort identified in the Management Agreement, which may result from Lessee's operations of the Expansion as shown by an economic impact study commissioned by Lessor at Lessee's cost.

v. Administrative and other costs Lessor incurs in connection with this Lease.

b. If Lessee accepts Lessor's preliminary determination of initial annual rent for the Second Term, it shall become annual rent under the Lease. If Lessee disapproves of Lessor's preliminary determination of annual rent for the Second Term, Lessee will deliver to Lessor its written notice of such disapproval ("Lessee's Disapproval Notice") within sixty (60) days following Lessee's receipt of Lessor's

preliminary determination of initial annual rent for the Second Term. Lessee's Disapproval Notice will state Lessee's conclusion for appropriate initial rent and identify, with specificity, the justification for Lessee's conclusion. During Lessee's 60-day review period, Lessor shall give Lessee, as soon as practicable and upon Lessee's request, full access to the information considered by Lessor in developing Lessor's preliminary determination of initial rent.

- c. Lessor and Lessee will negotiate diligently and good faith for a period of sixty (60) days following Lessor's receipt of Lessee's Disapproval Notice to determine a mutually acceptable initial rent which will become the initial annual rent for the Second Term under the Lease. If Lessor and Lessee are unable to reach agreement regarding initial annual rent for the Second Term within such sixty-day period, rent will be determined by arbitration in accordance with the arbitration provision applicable to Rent Reviews contained in Lessor's usual and customary lease form except that in reaching his decision, the arbitrator will consider the facts and circumstances referenced in this Paragraph 9B. The initial annual rent for the Second Term determined in accordance to this Paragraph will be subject to adjustment in accordance with Paragraphs 12 and 13 of this Expansion Lease Term Sheet.

**10. Percentage Rent:**

Lessee shall pay standard Board-adopted percentage rental rates with no offsets except that all revenues from convention center operations will be excluded.

**11. Expansion  
Construction:**

Lessee will be solely responsible for all soft-hard costs, pre-development and other costs for Expansion construction, which shall be commenced and completed in an amount of time fixed by the Lease. An executed completion guaranty for the total project cost will be required. SDCCC shall not seek any rental or construction cost offsets from the District.

**12. CPI Adjustments:**

Rents shall have mid-term CPI adjustments every five (5) years during the Second Term.

**13. Rent Reviews:**

Rent reviews shall be every 10 years during the Second Term.

**14. Security Deposit:**

Irrevocable letter of credit to be released upon completion of the Project as approved by the Board in an amount equal to three months minimum rent.

**15. No Contract:**

The parties understand and agree that this Term Sheet is nonbinding and is not intended to be and does not constitute a legally binding obligation, and that the terms herein are for



discussion purposes only. No legally binding obligations between the Parties will be created, implied, or inferred unless and until they are embodied in a final written agreement or agreements independent of this Term Sheet and executed by the Parties, subject to approval by the District's Board of Port Commissioners in its sole and absolute discretion.

**16. Hotel Requirements:** The Expansion Lease will provide that the Expansion Hotel will have access to the Convention Center's meeting rooms and banquet facilities in reasonable proximity to the Expansion Hotel at rates and other terms equal to those granted by Lessee to other hotel operators.

**17. Incorporation of WTC Parcel No. 1:** On the date that the Board of Port Commissioners approves the Expansion Lease, as referenced in paragraph 49(i) of the Amended/Restated/Combined lease between the District and Lessee, Parcel No. 1 of the Fifth Avenue Landing, LLC lease will be incorporated into the new Expansion Lease.

Lessee acknowledges that the parcel includes the landside improvements and underground utilities (to service both the landside and waterside improvements) for Fifth Avenue Landing, LLC's Water Transportation Center (WTC). Lessee shall have the option to cause the landside and underground improvements to be moved to a mutually agreeable location within the Expansion Site subject to the following provisions and conditions:

- (a) The cost for the planning and construction of such space and underground improvements, consistent with the scope and magnitude of the current design of such facility, shall be borne by Lessee. Fifth Avenue Landing, LLC shall have the right to review and have input to the operational integrity of the WTC as part of the Expansion; and Fifth Avenue Landing, LLC's approval of the scope and new location of such and underground improvements space shall not unreasonably be withheld;
- (b) The space will include:
  - (i) Administrative offices and a ticket booth facing the promenade;
  - (ii) Twelve parking spaces and a bus turn around;
  - (iii) A mutually agreeable size (not to exceed 16,296 square feet in aggregate) and location; and,
  - (iv) Appropriate easements for ingress and egress to both the landside and waterside improvements.

During any relocation, Lessee, at its sole cost and expense, shall provide Fifth Avenue Landing, LLC with mutually agreeable temporary space and uninterrupted utilities to both the temporary space and the waterside improvements.

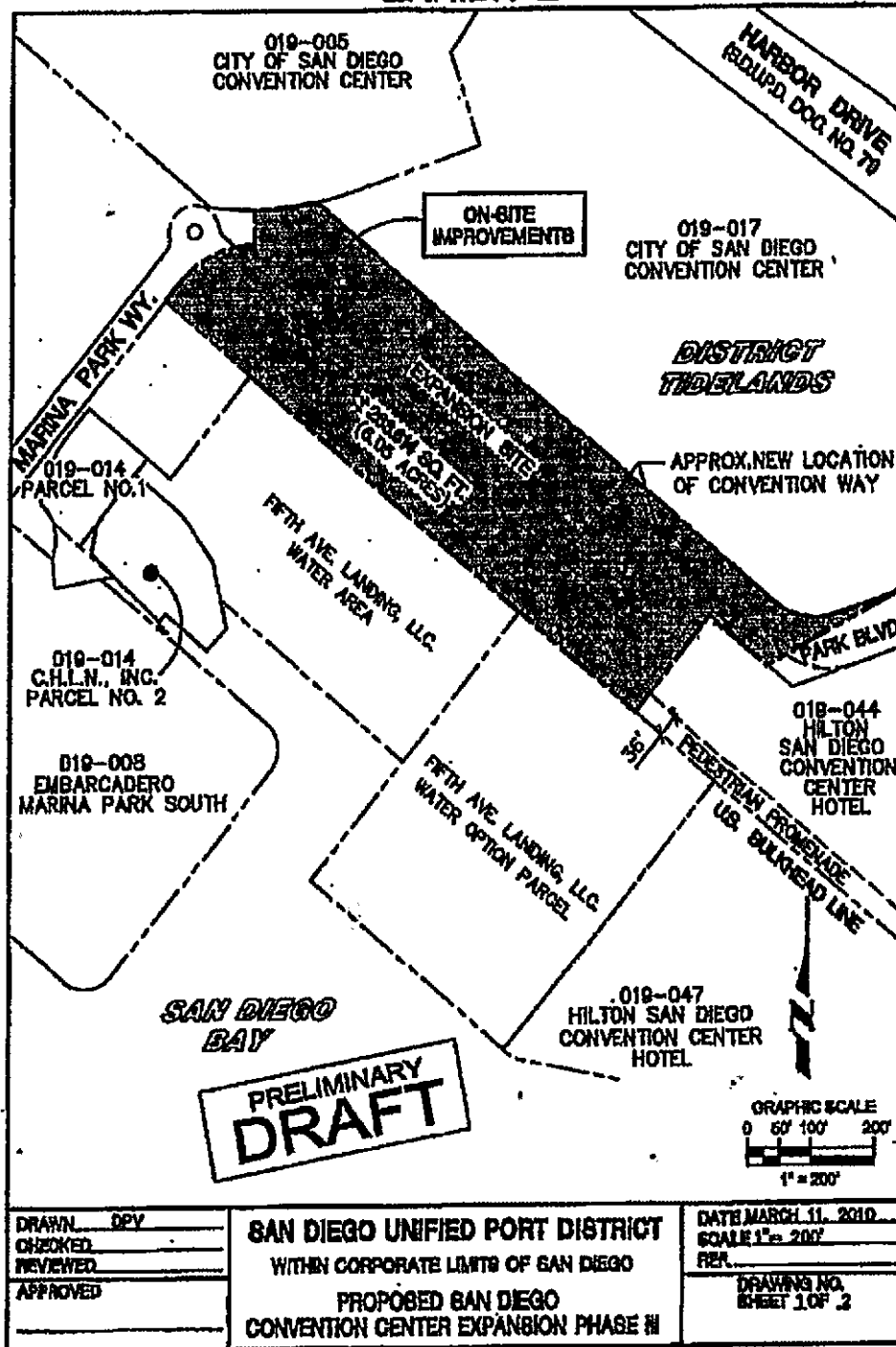
**18. District Policies:**

Lessee shall comply with all District policies in effect at the time of granting the Lease.

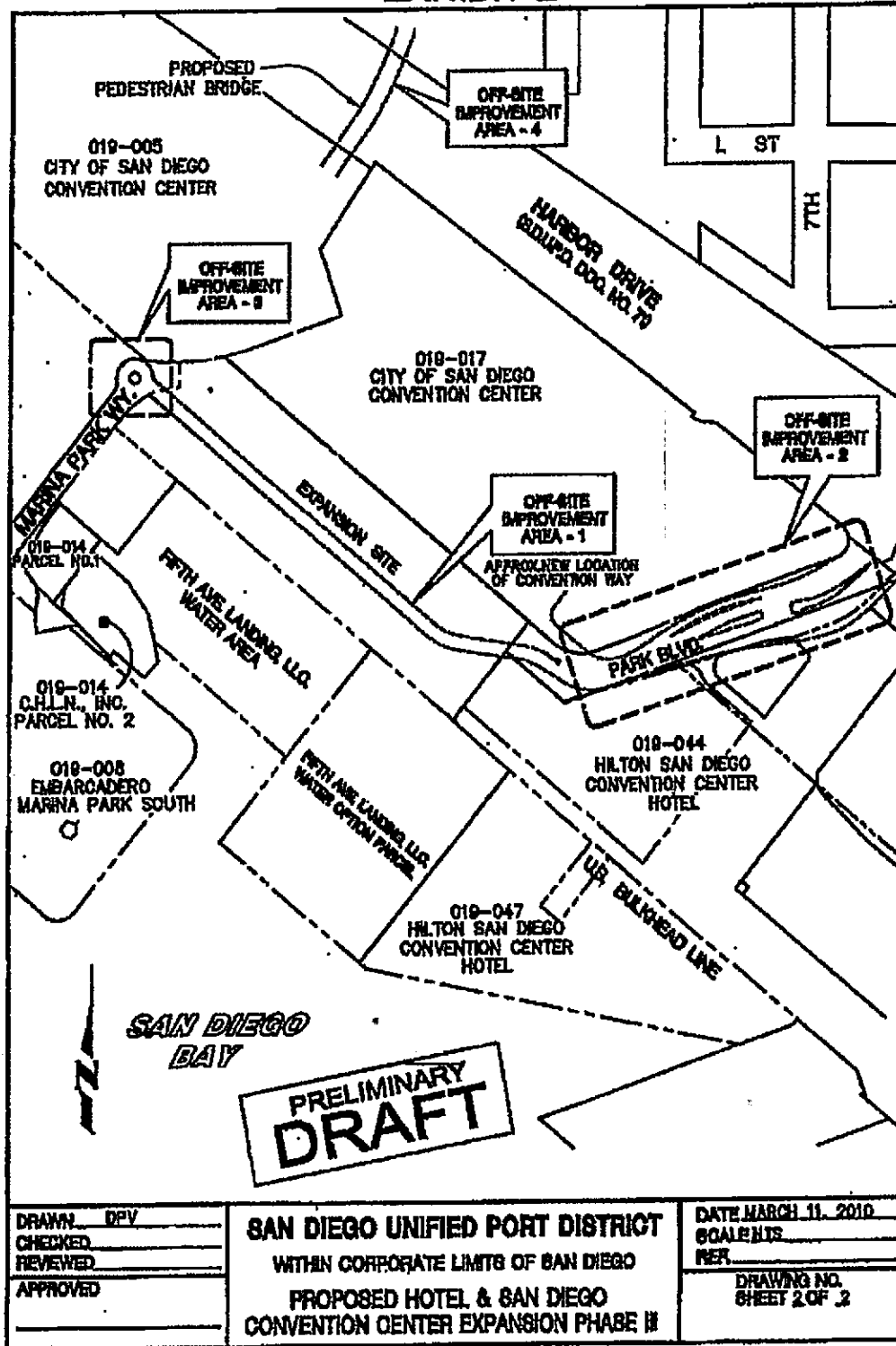
**20. Retail Merchandising  
Plan:**

As part of Lessee's application for a CDP for the Expansion, Lessee will deliver to Lessor a merchandising plan for all retail uses proposed for the Premises. The merchandising plan will describe the types of retail proposed, any unifying or thematic elements of the retail and provide reasonable assurance to Lessor that proposed retail uses are commercially viable. The merchandising plan will be subject to Lessor's approval. The Expansion shall contain retail development which complies with the Lessor-approved merchandising plan.

# EXHIBIT E



# EXHIBIT E



**EXHIBIT F**  
**HOTEL ENTITLEMENT SCHEDULE**  
**"Dates to be Determined"**

1. Environmental Application (EA) complete = Start of Environmental Review Process
2. Request for Proposals process for Environmental Impact Report (EIR) consultant
3. Board of Port Commissioners (BPC) for consultant selection and three party agreement (consultant, Port, and Lessee)
4. Submission of PMPA package to California Coastal Commission (CCC) and schedule hearing
5. CCC hearing on PMPA.
6. Submission of complete application to District for Coastal Development Permit.
7. Board of Port Commissioners considers issuance of appealable Coastal Development Permit.

**Estimated Total [assuming no legal challenges, no extended public review, no negotiation periods, and no changes to the project description that alters analysis needs] = 28 months**

**EXHIBIT G**

**CONVENTION CENTER HOTELS  
COMPETITIVE SET REVPAR LEVELS**

**Competitive Set:**

**San Diego Marriott Hotel & Marina  
Manchester Grand Hyatt  
Sheraton Harbor Island  
Omni Ballpark  
Westin Horton Plaza**

## **EXHIBIT H**

### **HOTEL LEASE TERM SHEET**

- 1. Parties:** San Diego Unified Port District ("District") and Lessee under Amended/Restated/Combined Lease with the District ("Lessee").
- 2. Premises:** Approximately one acre of tidelands located bay ward of the convention center between Marina Park Way and Park Boulevard as depicted in Exhibit H, Sheet 2.
- 3. Project:** The Hotel will contain a number of hotel rooms equal to the maximum number of hotel rooms permitted under the then-current PMPA with banquet and conference rooms, ballroom, restaurants, cocktail lounges, retail shops, and related development on the entire Premises including parking in accordance with Lessor's published standards, a public park/plaza of approximately one acre, public promenade along the waterfront, pedestrian bridge(s), and a public observation terrace, and an interface with the existing water transportation center. If the then-current Port Master Plan limits development to fewer than 400 hotel rooms on the Premises, Lessor acknowledges that Lessee has agreed to Paragraph 50(j) with the understanding that Lessee will seek an amendment to the Port Master Plan to increase the maximum number of hotel rooms permitted on the Premises to a number greater than 400. The Hotel will meet or exceed the service quality standards of the Hilton San Diego Bayfront, San Diego Marriott Hotel & Marina and Manchester Grand Hyatt hotels. The Hotel may include 110 parking spaces in the Convention Center, subject to Lessor and City of San Diego amending the Management agreement to that effect.
- 4. Revenue Projections:** Lessee will provide revenue projections for the hotel for up to 10 years.
- 5. Lease Grant:** The parties will negotiate a lease of the Premises to Lessee ("Lease") subject to conditions in the Amended/Restated/Combined lease between the District and Lessee being satisfactorily completed by Lessee. The lease document will be the District's standard lease document in effect as of the District's Hotel Approval Notice date to Lessee, as referenced in paragraph 50(h) of the Amended/Restated/Combined lease between the District and Lessee.

- 6. Lease Conditions:** The following Lease conditions will be completed by Lessee, prior to grant of Lease at the District's sole discretion:
- Public Outreach
  - Economic Feasibility Study
  - Conceptual Development Plans
  - Preliminary Plans
  - Working Drawings
  - Schematic Plans
  - Development Permits
  - Equity Commitment
  - Project Financing
  - Management Agreement
  - Equal Opportunity Program
  - Performance Bond
  - Construction Contract
  - Completion Guaranty
  - Lease Security Deposit
  - Lease Guaranty
- 7. Lease Uses:** The Premises shall be used solely and exclusively for hotel uses and for no other purposes whatsoever. This restriction on use of the Premises absolutely prohibits a change in use.
- 8. Lease Term:** Sixty-six years.
- 9. Minimum Rent:** Lessee shall pay annual minimum rent to be determined by a market rate appraisal at the time the District grants the Lease OR not less than Seventy-Five Percent (75%) of the proforma total percentage rents to be verified by an independent feasibility study with no offsets.
- 10. Percentage Rent:** Lessee shall pay standard Board-adopted percentage rental rates with no offsets.
- 11. Construction:** Lessee will be solely responsible for all soft-hard costs, pre-development and construction costs, for all private improvements on the Premises, which shall be completed in an amount of time fixed by the Lease. An executed completion guaranty for the total project cost will be required. Lessee shall not seek any rental or construction cost offsets from the District.
- 12. CPI Adjustments:** Rents shall have mid-term CPI adjustments every 5 years.
- 13. Rent Reviews:** Rent reviews shall be every 10 years.
- 14. Security Deposit:** Irrevocable letter of credit to be released upon completion of the Project as approved by the Board in an amount equal to



three months minimum rent.

**15. No Contract:**

The parties understand and agree that this Term Sheet is nonbinding and is not intended to be and does not constitute a legally binding obligation, and that the terms herein are for discussion purposes only. No legally binding obligations between the Parties will be created, implied, or inferred unless and until they are embodied in a final written agreement or agreements independent of this Term Sheet and executed by the Parties, subject to approval by the District's Board of Port Commissioners in its sole and absolute discretion.

**16. District Policies:**

Lessee shall comply with all District policies in effect at the time of granting the Lease.





San Diego Unified Port District

Document No. 56494

Filed MAY 11 2010  
Office of the District Clerk

SAN DIEGO UNIFIED PORT DISTRICT

LEASE TO

FIFTH AVENUE LANDING, LLC

OF PROPERTY LOCATED AT

FIFTH AVENUE AND MARINA PARKWAY

SAN DIEGO, CALIFORNIA

COMMENCING May 7, 2010

AND ENDING May 6, 2030

WITH TWO OPTIONS TO EXTEND OF FIVE YEARS EACH

FOR A TOTAL MAXIMUM TERM OF THIRTY (30) YEARS

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## TABLE OF CONTENTS

<u>Paragraph/Exhibit</u>	<u>Page Number(s)</u>
1. TERM.....	1
2. USE.....	1
3. RENT .....	4
3.1 COST OF LIVING RENT ADJUSTMENTS.....	10
3.2 RENT REVIEW .....	11
4. IMPROVEMENTS.....	14
5. CONSTRUCTION OF IMPROVEMENTS.....	14
6. TITLE TO IMPROVEMENTS.....	16
7. LIENS.....	18
8. LEASE ENCUMBRANCE.....	16
9. ASSIGNMENT – SUBLEASE.....	24
10. DEFAULTS AND REMEDIES .....	26
11. BANKRUPTCY .....	30
12. EMINENT DOMAIN.....	30
13. TERMINATION OF PRIOR AGREEMENTS.....	31
14. USE OBLIGATION.....	31
15. MAINTENANCE AND REPAIR .....	31
15.1 FACILITY CONDITION INSPECTIONS .....	31
16. PERFORMANCE BOND .....	34
17. TAXES AND UTILITIES .....	34
18. CONFORMANCE WITH LAWS AND REGULATIONS.....	34
19. EQUAL EMPLOYMENT OPPORTUNITY AND NONDISCRIMINATION.....	34
21. HOLD HARMLESS.....	35
22. SUCCESSORS IN INTEREST.....	36
23. EASEMENTS .....	36
24. TITLE OF LESSOR.....	36
25. INSURANCE .....	36
26. POLICY OF LESSOR.....	40
27. WARRANTIES-GUARANTEES-COVENANTS .....	40
28. DAMAGE TO OR DESTRUCTION OF LEASED PREMISES .....	40
29. QUITCLAIM OF LESSEE'S INTEREST UPON TERMINATION.....	40
30. PEACEABLE SURRENDER .....	41
31. WAIVER.....	41
32. HOLDOVER .....	41
33. PARAGRAPH HEADINGS .....	41
34. ENTIRE UNDERSTANDING .....	42
35. TIME IS OF THE ESSENCE .....	42
36. NOTICES .....	42
37. REMOVAL OF MATERIALS.....	43
38. WASTE/NUISANCE.....	43
39. NUMBER AND GENDER.....	43

40. APPLICABLE LAW.....	43
41. ATTORNEY FEES .....	43
42. HAZARDOUS MATERIALS.....	43
43. STORAGE TANKS.....	47
44. ENVIRONMENTAL DISCLOSURES.....	49
45. AS-IS LEASE AND WAIVERS .....	53
46. JOINT AND SEVERAL LIABILITY.....	55
47. SECURITY DEPOSIT .....	56
48. DISPUTE RESOLUTION .....	57
49. MEMORANDUM OF LEASE.....	58

#### **GUARANTY**

**Exhibit "A"**

**Exhibit "B"**

## LEASE

THIS AGREEMENT, made and entered into this 7<sup>th</sup> day of May, 2010, by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, hereinafter called "Lessor," and FIFTH AVENUE LANDING, LLC, a California limited liability company, hereinafter called "Lessee," WITNESSETH:

NOW THEREFORE, Lessor, for the consideration hereinafter set forth, hereby leases to Lessee for the term and upon the conditions hereinafter set forth, a portion of those lands within Lessor's jurisdiction, which lands are more particularly described as follows:

Approximately 25,843 square feet of tideland area known as Parcel No. 1 and approximately 155,428 square feet of water area known as Parcel No. 2 located on Convention Way and Marina Park Way in the City of San Diego, California, more particularly described and delineated on Lessor's Drawing No. 019-064 dated March 18, 2010, attached hereto as Exhibits "A" and "B" and by this reference made a part hereof, hereinafter "Leased Premises".

TO HAVE AND TO HOLD said Leased Premises for the term of the Lease and upon the conditions as follows:

1. **TERM:** The term of the Lease shall be for a period of twenty (20) years, commencing on the 7<sup>th</sup> day of May 2010 hereinafter called the "Commencement Date," and ending on the 6<sup>th</sup> day of May 2030, hereinafter called the "Termination Date," unless extended under Paragraph 1.4 or sooner terminated.

1.1 **TERM EXTENSIONS:** Lessee may extend the term of this Lease for up to two (2) additional terms of five (5) years each if:

- (a) At least one hundred eighty (180) days before the expiration of the immediate term, Lessee notifies Lessor in writing that it wishes to extend the term for five (5) additional years; and,
- (b) Following notification to Lessor in (a) above, but before the expiration of the immediately preceding term, Lessee satisfies the requirements of Paragraph 15.1 Facility Condition Inspections as may be required by Lessor.

Each additional term will commence upon the expiration of the immediately preceding term. If Lessee fails to satisfy the requirements of this Paragraph 1.1, then any remaining unexercised term extensions will automatically expire.

## 2. USE:

- (a) Leased Premises. Lessee agrees that Parcel Nos. 1 and 2 of the Leased Premises shall be used only and exclusively for (i) water transportation center

(which includes both a building on the landside and waterside improvements) for conducting harbor excursions, dinner cruises, whale-watching, ferry service, boat charters and water taxi operations, (ii) on reasonable and non-discriminatory terms and fees, the picking up and dropping off of passengers by water transportation operators approved by Lessor to operate on or from San Diego Bay, (iii) transient-oriented berthing facilities (which may be constructed in two phases) that will accommodate between 20 and 30 large yachts (the transient-oriented berthing facilities shall not be occupied by the same boat more than a cumulative total of one-hundred and eighty [180] calendar days in each calendar year during the term of the Lease (unless first approved in writing by Executive Director of Lessor on a case by case basis) and one berth shall be made available free of charge to a sailing club or through other means to make boating as a recreational use affordable to those members of the public not able to own personal watercraft), and (iv) parking; Notwithstanding the foregoing, the parties acknowledge and agree that the waterside improvements referenced in (iii) above cannot be completed unless and until Lessee exercises the option provided in Paragraph 2.2 below. The Option Parcel (Parcel No. 3) may be used for the uses specified in (i), (ii) and (iii) above, but only after all conditions in Paragraph 2.2 have been satisfied and the Option Parcel has been incorporated into the Leased Premises.

- (b) Recreational Dockage Requirement. During those periods of time, if any, that Lessor has in effect a policy, resolution, ordinance, statute, code or any other type of regulation relating to docking a boat in order to access restaurants, shopping or other types of facilities located on the Leased Premises ("Recreational Dockage Requirement"), Lessee agrees to at all times to be in full compliance with such Recreational Dockage Requirement.

**2.1 UNAUTHORIZED USE CHARGE:** Lessee shall pay Lessor Twenty Percent (20%) of the gross receipts for any service or use that is not permitted under this Lease. This payment is subject to the due date for rent and the provisions for delinquent rent provided in Paragraph 3 herein. The existence of the Twenty Percent (20%) charge in this Paragraph and the payment of this charge or any part thereof, does not constitute an authorization for a particular service or use, and does not waive any Lessor rights to terminate a service or use or to default Lessee for participating in or allowing any unauthorized use of the Leased Premises.

**2.2 LESSEE'S OPTION TO LEASE OPTION PARCEL:**

- (a) **Option Term.** If and when Lessor receives a Closure Letter resulting in the rescission of the Clean-Up and Abatement Order No. 95-21 and addendums thereto (collectively the "CAO"), Lessor shall grant Lessee an option to lease approximately 207,600 square feet of water area located contiguous to and extending beyond the Leased Premises, more particularly described and delineated as Parcel No. 3 ("Option Parcel") on Drawing No.019-064, dated March 18, 2010, attached hereto as Exhibits "A" and "B" and by this reference made a part hereof. Lessee has the right



to exercise the option for the entire water area only. The option shall be for the twenty-four (24) month period commencing on the date that Lessor notifies Lessee in writing that said Option Parcel is available for development. Notwithstanding the foregoing, Lessee shall not exercise the option for the Option Parcel until all of the following conditions have been fulfilled: (i) the Option Parcel Plans have been approved by Lessor pursuant to Paragraphs 4 and 5 herein; (ii) Lessee has obtained the written consent of the Regional Water Quality Control Board ("RWQCB") to construct the improvements on the Option Parcel; and, (iii) Lessee has obtained a permit from the United States Army Corps of Engineers to construct the improvements on the Option Parcel.

- (b) **Mitigation Measures.** If Lessee exercises said option, by providing Lessor with thirty (30) days' advance written notice, and develops said Option Parcel, the use of and the improvements to said Option Parcel shall be in full compliance with all local, state and federal laws, including without limitation, the California Environmental Quality Act ("CEQA"); and all project conditions and mitigation measures contained in the "Final Environmental Impact Report for South Embarcadero Program 2 and Port Master Plan Amendment (UPD #83358-EIR-435; Document #42492), including but not limited to the "Fifth Avenue Landing Hotel - Mitigation Monitoring and Reporting Program," ("FAL Mitigation Program") and the resolution certifying said Final Environmental Impact Report, Resolution No. 2001-71, adopted by the Lessor's Board of Port Commissioners on April 17, 2003. Lessee understands and agrees that it is responsible and shall implement the mitigation measures identified as "Owner/operator of leasehold" under the heading "Responsible for Mitigation Implementation" in the FAL Mitigation Program, attached as Exhibit "2A" (and as clarified in Exhibit "2B") to the Option Agreement between the parties hereto which is on file in the office of Lessor's Clerk bearing Document No. 40578. Lessor further agrees that it will comply with all Project conditions and all mitigation measures applicable to Lessee's proposed operations on the Option Parcel that are contained in the "Supplemental Environmental Impact Report for Campbell Sediment Remediation/Aquatic Enhancement" to be certified by the Lessor's Board of Port Commissioners.
- (c) **Lease Amendment.** Lessee acknowledges and agrees that Lessor's Board of Port Commissioners may, in its sole and absolute discretion, not approve of the Option Parcel Plans based on the environmental review under CEQA or other discretionary factors, and acknowledges that the Option Parcel Plans shall be approved only upon the performance of or subject to certain additional conditions or mitigation measures, including without limitation, sediment cap maintenance obligations such as, but not limited to, sediment and erosion monitoring, maintenance and repair; development of and compliance with best management practices for both construction and operation of the improvements to the Option Parcel to avoid recontamination of the sediment cap; and, other potential limitations on the use of the Option Parcel. Any such additional conditions or mitigation measures shall be the sole responsibility of Lessee. If Lessor grants approval for Lessee's Option Parcel Plans, such approval shall be subject to Lessor and Lessee mutually agreeing to amend this Lease to provide for (i) the incorporation of the Option Parcel into the Leased Premises; (ii) the construction of the proposed improvements to the Option Parcel and (iii) the conditions and mitigation measures required. In the event this option to lease Option

Parcel is not timely exercised, the option right shall be null and void and of no further force or effect.

3. **RENT:** Lessee agrees to pay to Lessor rent in accordance with the following:

- (a) The remaining term of this Lease shall be divided into the following rental periods, hereinafter "Rental Periods":

<u>May 7</u>	2010 -	<u>May 6</u>	2020 (first ten years of lease term to be inserted)
<u>May 7</u>	2020 -	<u>May 6</u>	2030 (second ten years of lease term to be inserted)
<u>May 7</u>	2030 -	<u>May 6</u>	2035 (first option to extend lease term to be inserted)
<u>May 7</u>	2035 -	<u>May 6</u>	2040 (second option to extend lease term to be inserted)

- (b) The rent for the Rental Period commencing shall be a minimum One Hundred Fourteen Thousand Dollars (\$114,000) per year, hereinafter "Minimum Annual Rent," subject to adjustment described in Paragraph 3.1 herein, or the cumulative total of the percentage rents per year as provided in (c) below, whichever is greater. Lessor and Lessee agree that said increased Minimum Annual Rent in the preceding sentence does not include any rent for the Option Parcel because Lessee will not be using said Option Parcel, except for ingress and egress.

- (c) Percentage rents shall be calculated on a monthly basis and shall be based on the following percentages of the gross income of the operations and businesses conducted on or from the Leased Premises:

- (1) Twenty-two Percent (22%) of the gross income from rental of boat berths, dock lockers, dinghy racks, and dry storage spaces, and from sale of related boat launching and retrieving services.
- (2) Ten Percent (10%) of the gross income from sale of parking services or rental of parking spaces.
- (3) Six Percent (6%) of the gross income from all sales related to crew-operated excursions, bicycle/pedestrian ferry services, and whale-watching operations including, but not limited to passenger tickets and incidental sales, except to the extent said income is reported and rent is paid to Lessor on such income under other leases granted by the Lessor.
- (4) Five Percent (5%) of the gross income from sale of merchandise, including but not limited to gifts, novelties, souvenirs, clothing, luggage, jewelry, cigars, cigarettes, candy, sundries, photographs (including, but not limited to, photographs related to crew-operated

excursions, dining and whale-watching operations) and incidentals of any kind.

- (5) Six Percent (6%) of the gross income from sales related to water taxi operations, except to the extent said income is reported and rent is paid to Lessor on such income under other leases granted by the Lessor.
- (6) Six Percent (6%) of the gross income from boat charters, defined herein as the hiring of boats with crew, or the hiring of boats on a "bare boat" basis for periods of twenty-four (24) hours or more, or the hiring of boats on a "bare boat" basis that are twenty (20) feet or more in overall length and except to the extent said income is reported and rent is paid to Lessor on such income under other leases granted by the Lessor. Said rent is in addition to the percentage rent required in subparagraph 3(c)(1) herein.
- (7) Ten Percent (10%) of the gross income from boat rentals, defined herein as the hiring of boats on a "bare boat" basis, of boats that are less than twenty (20) feet in overall length, for periods of less than twenty-four (24) hours. Said rent is in addition to the percentage rent required in subparagraph 3(c)(1) herein.
- (8) Three Percent (3%) of the gross income from sale of food related to crew-operated excursions, dining and whale-watching operations, except to the extent said income is reported and rent is paid to Lessor on such income under other leases granted by the Lessor.
- (9) Five Percent (5%) of the gross income from sale of alcoholic and nonalcoholic beverages related to crew-operated excursions, dining and whale-watching operations, except to the extent said income is reported and rent is paid to Lessor on such income under other leases granted by the Lessor.
- (10) Ten Percent (10%) of fees and charges levied on water transportation operators for use of Lessee's water transportation center facilities, or Lessee-provided services in connection therewith, that are not otherwise addressed within the foregoing provisions.
- (11) Ten Percent (10%) of the gross income from any and all activities, operations, and enterprises permitted under the terms of the Lease and not otherwise addressed within the foregoing provisions.

(12) Twenty Percent (20%) of the gross income from any and all services or uses not permitted under the terms of the Lease and not otherwise addressed within the foregoing provisions.

(d) The rent for each successive Rental Period and any extension thereof shall be adjusted in accordance with Paragraphs 3.1 and 3.2 herein and with the following. Lessor and Lessee agree that said increased Minimum Annual Rent in the preceding sentence does not include any rent for the Option Parcel.

(e) On or before the 20th day of each month, Lessee shall render to Lessor, in a form prescribed by Lessor, a detailed report of gross income for that portion of the accounting year which ends with and includes the last day of the previous calendar month. The accounting year shall be 12 full calendar months. The first accounting year shall begin on the first day of the first month during which the percentage rent described in this Lease becomes effective. Subsequent accounting years shall begin upon each anniversary of that date during the Lease term or any extension thereof. Each report shall be signed by Lessee or its responsible agent under penalty of perjury and shall include the following:

- (1) The total gross income for said portion of the accounting year, itemized as to each of the business categories for which a separate percentage rent rate is established.
- (2) The related itemized amounts of percentage rent computed, as herein provided, and the total thereof.
- (3) The total rent previously paid by Lessee for the accounting year within which the preceding month falls.

Concurrently with the rendering of each monthly statement, Lessee shall pay the greater of the following two amounts:

- (4) The total percentage rent computed for that portion of the accounting year ending with and including the last day of the preceding month [Item (2) above], less total rent previously paid for the accounting year [Item (3) above], or
- (5) One-twelfth (1/12th) of the Minimum Annual Rent, multiplied by the number of months from the beginning of the accounting year to and including the preceding month, less total rent previously paid for the accounting year [Item (3) above].

- (f) All payments shall be delivered to and statements required in Paragraph (e) above shall be filed with Lessor's Treasurer. Checks shall be made payable to the San Diego Unified Port District and mailed to the Treasurer's Office, San Diego Unified Port District, Post Office Box 120488, San Diego, California 92112-0488, or delivered to the Treasurer's Office, San Diego Unified Port District, 3165 Pacific Highway, San Diego, California. Lessor may change the designated place of payment and filing at any time upon ten (10) days' written notice to Lessee. Lessee assumes all risk of loss and responsibility for late charges, as hereinafter described, if payments are made by mail.
- (g) Lessee hereby acknowledges that late payment by Lessee to Lessor of rent and other sums due hereunder will cause Lessor to incur costs not contemplated by this Lease. Accordingly, in the event Lessee is delinquent in rendering to Lessor an accounting of rent due or in remitting the rent due in accordance with the rent provisions of this Lease, Lessee shall pay, in addition to the unpaid rent, five percent (5%) of the delinquent rent. If rent is still unpaid at the end of fifteen (15) days, Lessee shall pay an additional five percent (5%) [being a total of ten percent (10%)] (collectively, "Late Charges"). The parties hereby agree that said Late Charges are additional rent and are not interest, and that said Late Charges are appropriate to compensate Lessor for loss resulting from rent delinquency including, without limitation, lost opportunities, and the cost of servicing the delinquent account. Acceptance of such Late Charges and any portion of the late payment by Lessor shall in no event constitute a waiver of Lessee's default with respect to such overdue amount, nor prevent Lessor from exercising any of its other rights and remedies. The Executive Director of Lessor shall have the right, in his or her sole and absolute discretion, to waive for good cause any Late Charges upon written application of Lessee for any such delinquency period.
- (h) All payments by Lessee to Lessor shall be by a good and sufficient check. No payment made by Lessee or receipt or acceptance by Lessor of a lesser amount than the correct amount of rent due under this Lease shall be deemed to be other than a payment on account of the earliest rent due hereunder, nor shall any endorsement or statement on any check or any letter accompanying any check or payment be deemed an accord and satisfaction, and Lessor may accept such check or payment without prejudice to Lessor's right to recover the balance or pursue any other available remedy.
- (i) Lessee shall, at all times during the term of this Lease, keep or cause to be kept, accurate and complete records and double entry books of account of all financial transactions in the operation of all business activities, of whatever nature, conducted in pursuit of the rights granted herein. The records must be supported by source documents of original entry such as sales invoices, cash

register tapes, bank depository documentation, purchase invoices, or other pertinent supporting documents. Financial statements (a balance sheet and income/expense statement), based upon the double entry books of account, shall be prepared not less than annually.

All sales shall be recorded by means of a comprehensive system which includes sufficient business processes to ensure that all monies received are clearly and accurately recorded and are documented by system reports and/or original source documents. The system shall provide appropriate reporting and distinction of all sales categories and be able to generate an audit trail of all transactions. Sales may also be recorded by such other system if first approved in writing by the Executive Director of Lessor.

Contracts, bills, invoices, sales receipts or other similar-type documents evidencing transactions between any parties doing business under this Lease (including sublessees) shall in no event identify rent due to Lessor as a separate charge, fee or tax.

All Lessee's books of account, records, financial statements, and documentation related to this Lease or to business operations conducted within or from the Leased Premises or, shall be kept either at the Leased Premises or at such other locations as are acceptable to Lessor. Lessor shall have the right at any and all reasonable times to examine and audit said books, records, financial statements, and documentation, without restriction, for the purpose of determining the accuracy thereof, the accuracy of the monthly statements of gross income submitted, and the accuracy of the rent paid to the Lessor. In the event that the Lessee's business operations conducted within or from the Leased Premises are part of a larger business operation of the Lessee, and any part of the books, records, financial statements and documentation required herein is prepared only for the larger operation, and not solely for the business operations of the Leased Premises, then the Lessor shall also have the right to examine and audit that part of said books, records, financial statements, and documentation of the larger business operation.

Lessee's failure to keep such books of account, records, financial statements, and documentation and make them available for inspection by Lessor is a breach of this Lease and cause for termination. The Executive Director of Lessor shall have the discretion to require the installation of any additional accounting methods or controls he may deem necessary, subject to prior written notice. In the event the Lessee does not make available the original records and books of account at the Leased Premises or within the limits of San Diego County, Lessee agrees to pay all necessary travel expenses

incurred by Lessor in conducting an audit at the location where said records and books of account are maintained.

Additionally, if the audit reveals a discrepancy of more than five percent (5%) between the rent due as reported by Lessee and the rent due as determined by the audit, and/or Lessee has failed to maintain complete and accurate books of account, records, financial statements, and documentation in accordance with this Lease, then Lessee shall pay the cost of the audit, as determined by the Executive Director of Lessor, plus the rent determined to have been underpaid. In addition, should Lessee fail to pay said amounts within thirty (30) days after written notice from Lessor, then Lessee shall pay an additional fee of ten percent (10%) of said unpaid amounts as compensation to Lessor for administrative costs as previously described herein, along with the rent determined to have been underpaid.

Furthermore, if the audit reveals that rent due to Lessor is less than five percent (5%) between the rent due as reported by Lessee and the rent due as determined by the audit, and should Lessee fail to pay said unpaid rent within thirty (30) days after written notice from Lessor, then Lessee shall pay an additional fee of ten percent (10%) of said unpaid rent as compensation to Lessor for administrative costs as previously described herein, along with the rent determined to have been underpaid.

Lessee agrees to pay such amounts as set forth above. Acceptance of late charges and any portion of the late payment by Lessor shall in no event constitute a waiver of Lessee default with respect to late payment, nor prevent Lessor from exercising any of the other rights and remedies granted in this Lease. The Executive Director of Lessor shall have the right to waive for good cause any late charges upon written application of Lessee for any such delinquency period.

- (j) If the audit reveals that rent has been overpaid by Lessee, then Lessor shall credit Lessee in the amount of said overpayment which credit shall be used to offset future rental payment(s) due Lessor.

Gross income shall include all income resulting from operations, businesses and commercial activities conducted on or from the Leased Premises or any other property that is located within Lessor's jurisdiction (unless such income is being reported under another agreement with Lessor):

- (1) whether conducted by Lessee, its sublessees or concessionaires, or parties operating through Lessee, its sublessees, or concessionaires;
- (2) whether conducted with or without an agreement with Lessor or a tenant of Lessor or a tenant of Lessee;

Gross income shall include revenue from whatever source derived including, but not limited to: (i) sales via the Internet; (ii) sales via telephone; (iii) agency sales; and (iv) any other type of sales (whether such sales occur from the Leased Premises or elsewhere) resulting in Lessee's customers receiving services, products, or benefits on or from the Leased Premises or any property within Lessor's jurisdiction or from going to or from San Diego Bay and whether for cash or credit.

Gross income shall include any manufacturer's or importer's excise tax included in the prices of the goods sold, even though the manufacturer or importer is also the retailer thereof, and it is immaterial whether the amount of such excise tax is stated as a separate charge.

Gross income, however, shall not include any of the following: (1) sales of United States postage; (2) any sales or excise taxes payable by Lessee to any governmental agency as a direct result of operations under this Lease, provided that the amount of such taxes is shown on the books and records elsewhere herein required to be maintained; (3) gratuities, provided the customer voluntarily determines the amount of said gratuity to be paid, or the customer is aware that the Lessee has added a pre-established gratuity to the charge for the services rendered and said additional amount is segregated and identified as a gratuity on the billing to the customer; and (4) ticket sales price (If this Lease allows ticket sales for events that will occur on property not within Lessor's jurisdiction for events or activities in which Lessee has no ownership interest [e.g., San Diego Zoo, San Diego Wild Animal Park, Sea World, Caribbean cruises, etc.] gross income shall include all income, fees and commissions that Lessee receives as compensation for handling and making said ticket sales).

Further, refunds for goods returned shall be deducted from current gross income upon their return.

Bad debt losses shall not be deducted from gross income.

### 3.1. COST OF LIVING RENT ADJUSTMENTS:

- (a) This Lease shall provide for the following mid-term Rental Period adjustment dates, hereinafter "Adjustment Dates":

May 7, 2015 (5<sup>th</sup> anniversary of Lease to be Inserted)  
May 7, 2025 (15<sup>th</sup> anniversary of Lease to be Inserted)

- (b) On the referenced Adjustment Dates, the Minimum Annual Rent specified in Paragraphs 3(b) and 3(d) herein shall be adjusted by the increase, if any, in



the Consumer Price Index for All Urban Consumers for Los Angeles/Riverside/Orange County, CA/All Items based on the period 1982-84 = 100 as published by the United States Department of Labor's Bureau of Labor Statistics, hereinafter "CPI". The Minimum Annual Rent payable pursuant to Paragraphs 3(b) and 3(d) of this Lease shall be multiplied by a fraction, the numerator of which shall be the CPI for the calendar month which is three months prior to the Adjustment Date under consideration, and the denominator of which shall be the CPI for the calendar month which is three months prior to commencement of the then-current Rental Period. The sum so calculated shall constitute the new Minimum Annual Rent herein, but in no event shall such new Minimum Annual Rent be less than the Minimum Annual Rent payable for the Rental Period immediately preceding said Adjustment Date.

In the event the CPI is no longer published, the index for the Adjustment Date shall be the one reported in the U. S. Department of Labor's comprehensive official index most nearly corresponding to the foregoing description of the CPI. If the herein-described Department of Labor indices are no longer published, another index generally recognized as authoritative shall be substituted by agreement of the parties. If they are unable to agree within sixty (60) days after demand by either party, a substitute index will be selected by the Chief Officer of the San Francisco Regional Office of the Bureau of Labor Statistics or its successor.

Notwithstanding the publication dates of the CPI, the Minimum Annual Rent shall be adjusted to be effective on the Adjustment Dates. Until said Minimum Annual Rent Adjustment can be reasonably determined by CPI publication, Lessee shall continue to make rent payments pursuant to this Lease at the same rent in effect at the then-current Rental Period. Because of this provision, underpayments of rent shall be immediately paid to the Lessor.

### **3.2. RENT REVIEW:**

- (a) Beginning with the Rental Period which commences March 1, 2020 and at the commencement of each Rental Period thereafter as described in Paragraph 3(a) herein, the rent as specified in Paragraphs 3(b) and 3(c) herein shall be mutually agreed upon by Lessor and Lessee; provided, however, that (i) the Minimum Annual Rent agreed to at the commencement of each Rental Period shall not be less than 75% of the average total percentage rents paid during the last three accounting years of the previous Rental Period; (ii) the percentage rental rates shall not be less than the percentage rental rates most recently adopted by Lessor's Board of Port Commissioners; and, (iii)

the agreed-to Minimum Annual Rent shall be further adjusted in accordance with Paragraph 3.1 herein.

- (b) In the event the parties cannot agree to the rent for a Rental Period, the rent for said Rental Period shall be determined by three arbitrators in accordance with Sections 1280 through 1294.2 of the California Code of Civil Procedure.

The parties agree that, after notice by either party to the other requesting arbitration, each party shall appoint one arbitrator within thirty (30) days. Notice of the appointment shall be given by each party to the other party when made. Should either party fail to appoint its arbitrator within said time period, then the party that has appointed its arbitrator may petition the Superior Court of the state of California, county of San Diego, to appoint the second arbitrator. The party making the application shall give the other party notice of its application. All costs, including attorney fees associated with the court's appointment of the second arbitrator, shall be borne by the party which failed to appoint its arbitrator.

The two arbitrators shall immediately choose a third arbitrator to act with them. If they fail to select a third arbitrator within thirty (30) days following the appointment of the second arbitrator, on application by either party, the third arbitrator shall be promptly appointed by the then-presiding judge of the Superior Court of the state of California, county of San Diego, acting in his/her individual capacity. The party making the application shall give the other party notice of its application. All of the arbitrators shall be qualified real estate appraisers that are licensed to practice in the state of California.

By no later than thirty (30) days following the appointment of the third arbitrator, Lessor and Lessee shall each provide the other and each of the three arbitrators with (i) its rent proposal which shall consist of the Minimum Annual Rent and the percentage rental rates (and/or gallonage and/or flat rents if applicable) for the pending Rental Period under arbitration (the "Rent Proposal") and (ii) its appraisal report prepared by a qualified real estate appraiser licensed to practice in the state of California. In Lessor's and Lessee's Rent Proposal, the Minimum Annual Rent shall not be less than 75% of the average total percentage rent due during the last three accounting years of the immediately preceding Rental Period, and the percentage rental rates shall not be less than the percentage rental rates most recently adopted by Lessor's Board of Port Commissioners. In the event the Rent Proposal and the opinion of fair market rent expressed in the appraisal report differ, the Rent Proposal shall control. The appraisal reports shall consider: (1) the Leased Premises as if vacant of Lessee-owned improvements and available for new construction but with street access, utility services, and shoreline protection (if the Leased Premises are located on the waterfront) regardless

of who paid for the installation of the street improvements, utility services and/or shoreline protection; (2) the Leased Premises as having all regulatory entitlements and development rights for the types of uses permitted in Paragraph 2 above which includes, but is not restricted to, the design, construction and size of the existing improvements; (3) the highest and best use of the Leased Premises as if available for new leasing purposes under optimal development assumptions that are consistent with the uses provided in Paragraph 2 herein and to the other terms, conditions and restrictions of the Lease; (4) as if held by a private party in fee simple with all of the rights to sell, lease or transfer the owner's interest, and shall disregard any limitation resulting from public ownership; and (5) as if offered for lease in the open market. No diminution in value shall be taken as a result of any existing Hazardous Materials, as herein described, or improvements, or lack of improvements, on the Leased Premises. The appraisers shall use and analyze only the market data that is found in the marketplace, such as is demanded and received by other lessors for the same or similar types of uses allowed on the Leased Premises. In all cases, the appraisal reports shall be based upon recognized real estate appraisal principles and methods.

Within thirty (30) days following the selection of the third arbitrator, the three arbitrators shall conduct an arbitration hearing in the city of San Diego, California. The three arbitrators shall hear and consider the testimony of the Lessor and Lessee and their appraisal witnesses and any additional written information furnished by Lessor or Lessee. The amount and kind of evidence allowed and the rules of discovery and testimony shall be decided solely by the third arbitrator after consultation with the arbitrators appointed by the Lessor and Lessee.

The award determined by the arbitrators shall be effective and retroactive to the first day of the Rental Period under arbitration. The award shall be in writing and shall be made no later than fifteen (15) days following the arbitration hearing. The award shall be either Lessor's Rent Proposal or Lessee's Rent Proposal. The arbitrators shall not possess any right or authority to propose a compromise between Lessor's Rent Proposal and Lessee's Rent Proposal or the modification of either Rent Proposal. The arbitrators shall select whichever of the two Rent Proposals sets forth the rent that the majority of the arbitrators believe is closest to the market rent for the Leased Premises for the Rental Period under arbitration. A unanimous decision of the three arbitrators is not required. Within ten (10) days of the date the award is made, the underpayment of the rent, if any, shall be paid by Lessee to Lessor, with interest at the rate of ten percent (10%) per annum from the commencement of the rental period under arbitration, until paid. Any overpayment of the rent, if any, shall be credited to the next payment of rent owed by Lessee under this Lease following the award.

- (c) Lessor and Lessee shall each pay for its own attorney's fees, transcriptions, and the cost of its appointed arbitrator. Lessor and Lessee shall equally share the third arbitrator's fee and expenses and the cost of the hearing including, but not limited to, cost for using the facilities at which the hearing is conducted and the cost of the recorder of the testimony.

#### **4. IMPROVEMENTS:**

- (a) In accordance with the procedures described herein, Lessee may, at its own expense, make alterations or changes, or cause to be made, built, installed, or removed any structures, machines, appliances, utilities, signs, or other improvements necessary or desirable for the authorized use of the Leased Premises. Provided, however, said work shall be in accordance with plans and specifications, including but not limited to working drawings, hereinafter "Plans," previously submitted to and approved in writing by Lessor.
- (b) No construction, installation, or removal of any improvement upon the Leased Premises shall commence without Lessor's prior written approval. All construction, installations, and removals shall be in accordance with Plans submitted to and approved in writing by Lessor prior to the commencement of any such work. All Plans are subject to changes as may be approved by Lessor, in Lessor's sole discretion. Further, all work shall be in accordance with all applicable laws, regulations, ordinances, and codes.
- (c) Notwithstanding the foregoing, within the interior of any enclosed building structure, and without Lessor's prior consent, Lessee shall have the right to install and/or remove machines, equipment, appliances, and trade fixtures that are necessary or desirable for the authorized use of the Leased Premises.
- (d) When required by Lessor, Lessee shall, at its sole cost and expense, pave or landscape the entire portion of the Leased Premises not covered by structures. All paving and/or landscaping shall be in compliance with Lessor's "South Embarcadero Urban Design + Signage Guidelines" as it now exists or, as it may be amended in the future, and in accordance with Plans which must be submitted to and approved in writing by Lessor prior to the commencement of any such paving and/or landscaping and shall be in compliance with all governmental stormwater laws and regulations.
- (e) Lessee shall notify Lessor prior to submitting application(s) to any governmental regulatory agency for any development or construction permit or license pertaining to the Leased Premises. Lessee shall also provide Lessor with a copy of all application(s) within five (5) days of making said

application(s), along with copies of all Plans submitted as part of the application(s). Lessee shall also provide Lessor, within ten (10) days of Lessee's receipt, a copy of all permits, licenses, or other authorizations subsequently issued.

- (f) Lessee agrees that no banners, pennants, flags, spinners, or other advertising devices, nor any temporary signs, shall be flown, installed, placed, or erected on the Leased Premises without Lessor's prior written consent.

**5. CONSTRUCTION OF IMPROVEMENTS:** Lessee shall complete development of the "Fifth Avenue Landing Water Transportation Center" Project defined in the Coastal Development Permit ("CDP") issued by Lessor to Lessee, dated September 4, 2007, which permit is on file in the Office of the Clerk of Lessor bearing Document No. 52525. Should Lessee fail to comply with any requirement of said CDP shall be considered a Default as per Section 10 of this Lease. Furthermore:

- (a) In the event Lessee exercises the option to lease the Option Parcel set forth in Paragraph 2.2, the Option Parcel Improvements, include in-water improvements such as piers and floats. The parties understand and agree that Lessee has existing piers, floats, and other in-water improvements that should provide Lessee with "shading" mitigation credits for some of its future in-water improvements and that Lessee will probably require additional "shading" mitigation credits to complete these in-water improvements. Lessor believes that it may have available "shading" mitigation credits that resulted from the removal of piers, floats, and other in-water improvements from the adjacent property (hereinafter "Shading Credits"), but as Lessee hereby acknowledges, the ownership and use of those Shading Credits may be at issue as a result of two pending lawsuits, one each of which is filed in state and federal court, that purport to cloud title to the adjacent property from which the Shading Credits were obtained and thus to cloud title to the Shading Credits. In the event that these Shading Credits may be available for mitigation of Lessee's construction of the Option Parcel Improvements, however, Lessee shall have the right of first refusal to attempt to use the lesser of (i) sufficient Shading Credits for the Project's in-water improvements that are over and above "shading" mitigation credits related to the Leased Premises that Lessee may possess or (ii) Seventy Thousand (70,000) square feet of Shading Credits. Lessee acknowledges and accepts the risk that no Shading Credits, or less than that required to mitigate for the Option Parcel improvements, may be available and subject to transfer for its potential use. Lessee further acknowledges and agrees that it remains solely responsible for obtaining all governmental approvals to use such Shading Credits, if any exist, to mitigate the construction of Lessee's Option Parcel Improvements, and acknowledges and accepts the risk that any or all such government approvals may not be forthcoming. To the extent that the Shading Credits

are available for Lessee's use, Lessee acknowledges and agrees that such Shading Credits may be used as mitigation for the Project only, and for no other use, and may not be sold or transferred by Lessee to any other party. Any Shading Credits not used for the Project shall be returned to and remain the property of Lessor, at no cost to Lessor. In any event, title and all rights to any such Shading Credits that have not been used as mitigation for the Project by June 30, 2013, whether or not such Shading Credits have purportedly or actually transferred to Lessee, shall revert automatically to Lessor, and Lessee's right of first refusal herein shall be null and void and of no further force or effect.

- (b) Within sixty (60) days following completion of any substantial improvement within the Leased Premises, but at not less than quarterly intervals, Lessee shall furnish Lessor an itemized statement of the actual construction cost of such improvement. The statement shall be sworn to and signed, under penalty of perjury, by Lessee or its responsible agent.

Lessee shall maintain true, accurate, and complete records to support said statement. Such records shall include, but are not limited to a general ledger, vendor invoices, cancelled checks, construction loan documentation, agreements with third-party contractors, and contractor progress payment billings. Additionally, should Lessee perform any construction in-house, Lessee shall substantiate the actual work performed by maintaining a payroll journal, copies of cancelled payroll checks, and timecards or other payroll documents which show dates worked, hours worked, and pay rates.

Books and records herein required shall be maintained and made available either at the Leased Premises or at such other location as is agreeable to Lessor. Further, Lessor shall have the right at any and all reasonable times to examine and audit said books and records without restriction for the purpose of determining the accuracy thereof, and the accuracy of the aforesaid statement. In the event Lessee does not make available the original books and records at the Leased Premises or within the limits of San Diego County, Lessee agrees to pay all necessary expenses incurred by Lessor in conducting an audit at the location where said books and records are maintained.

- (d) The time(s) during which Lessee's construction is delayed by acts of God, war, invasion, rebellion, revolution, insurrection, riots, labor problems, unavailability of materials, government intervention, or acts or omission of Lessor, shall be added to the times for the commencement and completion of construction established in Paragraph 5(a) herein. Provided, however, in no event shall the period of excused delay exceed 365 days in the aggregate.

- (e) Failure to comply with this Paragraph is a breach of this Lease and cause for termination in accordance with Paragraph 10 herein.

**6. TITLE TO IMPROVEMENTS:** For the purpose of this Paragraph, "improvements" shall include, but are not limited to subsurface improvements. On the Commencement Date of this Lease, all existing structures, buildings, installations and improvements of any kind located on the Leased Premises are owned by and title thereto is vested in Lessor. All said existing structures, buildings, installations and improvements as well as structures, buildings, installations and improvements as well as structures, buildings, installations and improvements of any kind placed on the Leased Premises by Lessee subsequent to the Commencement Date of this Lease shall, at the option of Lessor, be removed by Lessee at Lessee's expense. Lessor may exercise said option as to any or all of the structures, buildings, installations and improvements either before or after the Termination Date or sooner termination of this Lease. If Lessor exercises such option, Lessee shall remove such structures, buildings, installations or improvements within (60) days after the Termination Date of this Lease or sooner termination thereof, whichever occurs earlier. Provided however, Lessee agrees to repair any and all damage occasioned by their removal. Title to any such structures, buildings, installations, and/or improvements not so removed within said sixty (60) days shall vest in the Lessor, without cost to Lessor and without any payment to Lessee, except that Lessor shall have the right to have them removed and to repair any and all damage occasioned by their removal, all at the expense of Lessee.

On the Commencement Date of this Lease, all existing machines, appliances, equipment, trade fixtures, and portable public artworks (i.e., artworks that are not architecturally integrated into the structures and buildings and are capable of being removed and transported to another location without being damaged) located on the Leased Premises are owned by and title thereto is vested in Lessee. Furthermore, all machines, appliances, equipment, trade fixtures, and portable public artworks placed on the Leased Premises by Lessee subsequent to the Commencement Date of this Lease are owned by and title thereto is vested in Lessee. All machines, appliances, equipment, trade fixtures, and portable public artworks shall be removed by Lessee within sixty (60) days after the Termination Date of this Lease or sooner termination thereof, whichever occurs earlier. Provided, however, Lessee agrees to repair any and all damage occasioned by their removal.

Notwithstanding the foregoing, any such machines, appliances, equipment, trade fixtures and portable public artworks placed on the Leased Premises by Lessee as qualification for the term of this Lease pursuant to Paragraph 5 herein, as well as portable public artworks located on the Leased Premises on the Commencement Date of this Lease, may only be removed by Lessee, at Lessor's option. If machines, appliances, equipment, trade fixtures, and portable public artworks required by Lessor to be removed are not removed by Lessee within sixty (60) days after the Termination Date of this Lease or sooner termination thereof, whichever occurs earlier, the same may be considered abandoned and shall thereupon

become the property of Lessor, without cost to the Lessor and without any payment to Lessee, except that Lessor shall have the right to have them removed and to repair any and all damage occasioned by their removal, all at the expense of Lessee.

During any period of time employed by Lessee under this Paragraph to remove structures, buildings, installations, improvements, machines, appliances, equipment trade fixtures, and public artworks, Lessee shall continue to pay the full rent to Lessor in accordance with this Lease, which said rent shall be prorated daily.

7. **LIENS:** Lessee shall defend, indemnify and hold harmless Lessor against all claims and liens for labor, services, or materials in connection with improvements, repairs, or alterations on the Leased Premises, and the costs of defending against such claims and liens, including reasonable attorney's fees.

In the event that any such claim or lien, or any other claim(s), lien(s) or levy(ies) whatsoever of any nature caused by Lessee or Lessee's sublessees, contractors, and agents, is filed against the Leased Premises or the leasehold interests of the Lessee therein, Lessee shall, upon written request of Lessor, deposit with Lessor a bond conditioned for the payment in full of all claims upon which said lien(s) or levy(ies) have been filed. Such bond shall be acknowledged by Lessee, as principal, and by an entity licensed by the Insurance Commissioner of the state of California to transact the business of a fidelity and surety insurance company, as surety. Lessor shall have the right to declare this Lease in default in the event the bond required by this paragraph has not been deposited with the Lessor within ten (10) days after written request has been delivered to Lessee.

This provision shall not apply to a foreclosure of a trust deed or mortgage encumbering the leasehold if the encumbrance has previously received Lessor consent in accordance with Paragraph 8 herein.

#### 8. **LEASE ENCUMBRANCE:**

- (a) **Lessor's Consent to Encumbrance.** Lessee shall not encumber the Lease, leasehold interest, and the improvements thereon by a deed of trust, mortgage, or other security instrument to assure the payment of Lessee's promissory note, without Lessor's prior written consent, in each instance. If Lessee enters into any deed of trust, mortgage, or other security instrument that encumbers the Lease, leasehold interest, or the improvements thereon without Lessor's prior written consent, Lessor shall have the right to declare this Lease in default.

In the event Lessee requests Lessor's consent to any Lease encumbrance, hereinafter referred to as a "transaction" in this Paragraph 8, Lessee shall reimburse Lessor for all Lessor's reasonable costs and expenses associated with said transaction. Said costs shall include reasonable legal fees and



disbursements relating to or arising out of any such transaction, regardless of whether such transaction is consummated.

In the event Lessor consents to any Lease encumbrance, said consent shall be conditioned upon the following: (i) if, on the effective date of such proposed encumbrance, the rent being paid under this Lease is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent; (ii) if deemed necessary by Lessor, a Lease amendment shall be executed which will include new or revised lease provisions, (iii) the maximum loan proceeds shall not be in excess of the greater of 75% loan-to-value as determined by lender's appraisal, or the amount of repayment of existing financing that encumbers the leasehold, (iv) the loan shall have an amortization term that is less than the remaining term of the ground lease, and (v) the Lessee shall acknowledge in writing that it will not seek rent relief as a result of not being able to meet its debt repayment obligations. Upon the effective date of any said consented-to-encumbrance, Lessee shall thereafter pay to Lessor the market rent as referenced herein, subject to adjustments and rent reviews as provided in Paragraphs 3.1 and 3.2 herein

In the event of a consented-to encumbrance, if the parties cannot agree to an amount that is equal to the market rent, the rent shall be determined by the procedure described in Paragraph 3.2 herein, except that the award shall be effective and retroactive to the effective date of the consented-to encumbrance.

- (b) Definition of "Consented-to-Lender". The term "Consented-to-Lender" as hereinafter used in this Lease, means the lender holding an encumbrance consented to by Lessor. It may include one or more lenders holding obligations of the Lessee secured by a single deed of trust, mortgage, or other security instrument.
- (c) Voluntary Lease Surrender. Without the prior written consent of the Consented-to-Lender, should Lessee owe the Consented-to-Lender any amounts under any security instrument encumbering this Lease, leasehold interest, or the improvements thereon, Lessor will not accept the voluntary surrender, cancellation, or termination of this Lease before the expiration of the term thereof.
- (d) Loan Default. If a deed of trust, mortgage, or other security instrument consented to by Lessor is in default at any time, the Consented-to-Lender shall, as provided by law, have the right, without Lessor's prior consent, to:
  - (1) Accept an assignment of the Lease in lieu of foreclosure; or

- (2) Cause a foreclosure sale to be held pursuant to either judicial proceedings or power of sale as provided in its deed of trust, mortgage, or other security instrument.

Provided, however, with the exception of said Consented-to-Lender, no assignment to the successful bidder shall be effective without Lessor's prior written consent.

- (e) Assume Lease Obligations. Before said Consented-to-Lender, or any other future consented-to assignee, acquires the leasehold interest, it shall, as an express condition precedent, agree in writing to assume each and every obligation under the Lease. Furthermore, before any said Consented-to-Lender, or any other future consented-to assignee or purchaser, may subsequently assign or sublease all or any portion of the leasehold interest, it shall, in each instance, obtain Lessor's prior written consent.

Further, a Consented-to-Lender that has: (i) acquired the leasehold interest and assumed the Lessee's obligations, or (ii) entered into a new lease pursuant to Paragraph 10 herein, concurrently with a termination of this Lease, shall be released from all further obligations under this Lease after it assigns the leasehold interest to an assignee consented to by Lessor, in accordance with this Paragraph 8.

- (f) Lessor's Consent to Assignment. Whenever a Consented-to-Lender is required by the provisions of this Paragraph 8 to obtain Lessor's prior consent to an:

- (1) Assignment to the successful bidder upon a foreclosure by said Consented-to-Lender; or
- (2) Assignment or sublease of all or substantially all of the Leased Premises by said Consented-to-Lender should it become the lessee by reason of: (i) being the successful bidder upon said foreclosure, or (ii) an assignment in lieu of foreclosure, or (iii) under a new lease entered into pursuant to Paragraph 10 herein; then Lessor will grant such consent if:
- (i) The principal(s) of such assignee, purchaser, or sublessee are reputable (meaning the absence of reputations for dishonesty, criminal conduct, or association with criminal elements -- "reputable" does not mean "prestigious," nor does the determination of whether one is reputable involve considerations of personal taste or preference);

- (ii) The principal(s) of such assignee, purchaser, or sublessee possess sufficient business experience and financial means to perform Lessee's obligations under this Lease—according to the then-current standards for business experience and financial means that Lessor generally requires of new or renewed lessees at the time of the request; and
- (iii) The assignee, purchaser, or sublessee agrees in writing to assume each and every obligation under this Lease.

Further, Lessor will not unreasonably or arbitrarily withhold such consent. Provided, however, no such assignee, purchaser, or sublessee shall subsequently: (i) assign, transfer, or sublease any or all of the Leased Premises without Lessor's prior written consent, in accordance with Paragraph 9 herein; or (ii) encumber the Lease, leasehold interest, and improvements thereon without Lessor's prior written consent, in accordance with this Paragraph 8.

Provided further, if said Consented-to-Lender becomes the lessee by reason of: (i) being the successful bidder upon foreclosure, or (ii) an assignment in lieu of foreclosure, or (iii) being the lessee of a new lease entered into pursuant to Paragraph 10 herein, then said Consented-to-Lender may, upon a subsequent assignment or subleasing of all or substantially all of the Leased Premises, take back from its assignee, purchaser, or sublessee, a purchase money deed of trust, mortgage, or security instrument. Provided, however, said Consented-to-Lender must execute and submit to Lessor documentation substantially in the same form and content as was originally submitted to Lessor when consent was granted to the earlier encumbrance. Only said Consented-to-Lender or the successful bidder upon said foreclosure may enforce the provisions of this Paragraph 8. Further, no other third party shall have the rights or remedies, as third-party beneficiaries, or otherwise, hereunder.

The burden of producing evidence and the burden of proof showing Lessor that a prospective assignee, purchaser, or sublessee meets each and all of the aforesaid qualifications and standards shall be on said Consented-to-Lender or successful bidder upon foreclosure. Lessor's decision shall be based upon Lessor's high duty of care in administering a valuable public resource, which it holds in trust for the people of the state of California. In the absence of fraud or arbitrary or unreasonable action in applying or failing to apply said standards, Lessor's decision shall be final.

- (g) If Lessor Rejects Lease Transferee. In the event Lessor rejects: (i) the successful bidder upon foreclosure, or (ii) a proposed assignee or sublessee

of the Consented-to-Lender (said successful bidder or Consented-to-Lender being sometimes referred to hereinafter as the "Aggrieved Party," and said successful bidder, or proposed assignee or sublessee from the Consented-to-Lender being sometimes referred to hereinafter as the "Applicant"), the sole remedy of the Aggrieved Party shall be to seek relief in the nature of specific performance through the arbitration procedure hereinafter established. Further, in no event shall Lessor be liable to the Aggrieved Party or Applicant, or any person or entity whatsoever, for money damages. Provided, however, the Aggrieved Party shall be entitled to recover such damages, if any, it may sustain as a result of Lessor's failure or refusal to comply with a Superior Court order confirming an award in favor of the Aggrieved Party in said arbitration.

The issue to be submitted to arbitration shall be whether Lessor's Board of Port Commissioners' record contains substantial evidence to support the decision to reject the Applicant in accordance with the standards of reputation, business experience, and/or financial means, as provided herein. The Aggrieved Party may submit said issue to arbitration.

The arbitration shall be conducted pursuant to Title 9 of Part 3 of the California Code of Civil Procedure (section references herein shall be to the Code of Civil Procedure), as amplified and modified by the following provisions:

- (1) Arbitration shall be initiated by the Aggrieved Party filing a written demand for arbitration with Lessor no later than thirty (30) days following Lessor's adoption of a resolution rejecting the Applicant. If the Aggrieved Party so elects, Lessor shall be deemed to have adopted a resolution rejecting an Applicant if Lessor has not acted within ninety (90) days after the Aggrieved Party files a written application for Lessor to approve the Applicant;
- (2) Said arbitration shall be conducted by a single neutral arbitrator who shall not be a County of San Diego resident;
- (3) If the parties have not agreed on the selection of the arbitrator within five (5) days after said demand for arbitration is filed, either party may petition the Superior Court of the state of California, county of San Diego, to select the arbitrator pursuant to Section 1281.6;
- (4) Each party shall submit its nominees, if any, to the court within five (5) days after said petition is served and filed;

- (5) Said arbitrator shall not conduct a trial de novo, but shall consider only said record before Lessor's Board of Port Commissioners. Provided, however, said arbitrator may consider evidence outside said record if the arbitrator believes that the Board's decision was affected by Lessor's fraudulent action which was not reasonably discoverable prior to the Board's decision;
  - (6) Said arbitrator shall make the award in writing within forty-five (45) days of being appointed;
  - (7) The right of any party to take depositions for discovery purposes, as provided in Section 1283.05, shall be waived;
  - (8) Certain time periods established in said Title 9 shall be shortened as follows:
    - (i) Sections 1284, 1288.4, 1290.2, and 1290.6--halved;
    - (ii) Section 1288--four years to 30 days and 100 days to 15 days; and,
    - (iii) Section 1288.2--100 days to 15 days;
  - (9) San Diego, California shall be the venue of the arbitration hearing and any court proceedings;
  - (10) The decision of the Superior Court in any proceeding to confirm, correct, or vacate the award shall be final, and the parties to said arbitration waive any rights to appeal therefrom, as provided in Sections 1294 and 1294.2, or otherwise; and
  - (11) The parties shall bear their costs, fees, and expenses incurred in connection with said arbitration, in accordance with the provisions of Section 1284.2.
- (h) **Notice of Foreclosure Sale.** Said Consented-to-Lender shall include a statement in any Notice of Foreclosure Sale covering the foregoing requirements for Lessor's consent to an assignment upon said foreclosure.
- (i) **Subsequent Encumbrance.** Except for subleases, utility easements, and other necessary rights-of-way, Lessor shall not expressly consent to a subsequent lien or encumbrance against the Leased Premises without said Consented-to-Lender's prior written consent.

- (j) **Assignment of Security Interest.** Said Consented-to-Lender shall not assign its security interest in the Leased Premises in whole or in part without Lessor's prior written consent, in each instance. Provided, however, Lessor's consent to such an assignment shall be deemed granted (and such assignee will for all purposes of this Lease be deemed to be a Consented-to-Lender) if the assignment is to:

- (1) A financial institution in good legal standing under the laws of its jurisdiction of incorporation having assets exceeding Five Hundred Million Dollars (\$500,000,000); or
- (2) The United States of America or any state thereof, or any agency thereof; or
- (3) An assignee by operation of law; e.g., a state insurance department engaged in supervising the liquidation or rehabilitation of an insurance company lender.

Provided, however, for purposes of the foregoing provisions "financial institution" shall mean: (i) an insurance company qualified to do business in the state of California; or (ii) a federally- or state-chartered bank, savings bank, or savings and loan association; or (iii) a pension or retirement fund operated for the employees and former employees of, and regulated and controlled by, the United States of America or any state thereof, or any agency thereof; e.g., the California State Teachers' Retirement System.

Provided, further, no subsequent assignment by such assignee will be permitted unless:

- (4) The assignment conforms to all requirements of this Paragraph 8;
- (5) A duplicate original(s) of such assignment is furnished Lessor; and
- (6) In case of an assignment where Lessor's consent is deemed granted: (i) assignee promptly furnishes Lessor reasonably satisfactory evidence that said assignee complies with the foregoing requirements, and (ii) said assignee expressly agrees to take such assignment subject to all Lessor's rights under this Lease.

**9. ASSIGNMENT - SUBLEASE:** Lessee shall not, without the prior written consent of Lessor:

- (a) Assign or transfer the whole or any part of this Lease or any interest therein;

- (b) Sublease (which shall also include management and/or operating agreements covering the Leased Premises) the whole or any part of the Leased Premises;
- (c) Permit transfer of the Lease or possession of the Leased Premises by merger, consolidation, or dissolution of Lessee;
- (d) Notwithstanding the provisions contained in Paragraph 8 herein, permit hypothecation, pledge, encumbrance, transfer or sale, voluntary or involuntary, in whole or in part, of this Lease or any interest therein; or
- (e) Permit the occupancy of the whole or any part of the Leased Premises by any other person or entity.

Notwithstanding the foregoing, nothing herein contained shall be construed to prevent the occupancy of said Leased Premises by an employee or business invitee of Lessee.

- (f) Permit the transfer or sale, voluntary or involuntary, of the entire corporation to a third party other than Lessee's parent company, including subsidiaries or affiliates; or
- (g) Contract for the management or operation of the whole or any part of the Leased Premises.

In the event Lessee requests Lessor's consent to any Lease assignment, Lease transfer, Lease amendment, and/or sublease, hereinafter referred to as a "transaction," Lessee shall reimburse Lessor for all Lessor's reasonable costs and expenses associated with said transaction. Said costs shall include reasonable legal fees and disbursements relating to or arising out of any such transaction, regardless of whether such transaction is consummated.

In the event Lessor consents to any Lease assignment or transfer, said consent shall be conditioned upon the following: (i) if, on the effective date of such proposed assignment or transfer, the rent being paid under this Lease is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent; (ii) assignee shall agree and assume each and every obligation under the Lease; (iii) if deemed necessary by Lessor, a Lease amendment shall be executed which will include new or revised lease provisions; and (iv) assignee shall comply with other conditions and qualifications determined by the Board of Port Commissioners of Lessor. Notwithstanding, items (i), (iii), and (iv) shall not apply in the event of: (a) a Lease assignment or transfer to a third party from a Consented-to-Lender which acquired title to the Lease by foreclosure or deed in lieu of foreclosure or a new Lease pursuant to the provisions of Paragraph 10 herein, or (b) assignment or transfer of the Lease to a Consented-to-Lender by deed in lieu of foreclosure, or to a Consented-to-Lender or a third party as the successful bidder at a foreclosure sale. Upon the effective

date of any said consented-to Lease assignment or transfer, assignee shall thereafter pay to Lessor the market rent as referenced herein, subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein.

In the event Lessor consents to any sublease, said consent shall be conditioned upon the following: (i) if, upon the effective date of any said consented-to sublease, the rent being paid for the sublease area is less than market rent, Lessor shall thereafter be paid additional rent to equal market rent for the sublease area as long as said sublease is in effect; (ii) if deemed necessary by Lessor, a Lease amendment shall be executed which shall include new or revised lease provisions; and (iii) Lessee shall comply with other conditions and qualifications determined by the Board of Port Commissioners of Lessor. Furthermore, as long as said sublease is in effect, rent for the sublease area shall be subject to adjustments and rent reviews as provided in Paragraph(s) 3.1 and 3.2 herein. For purposes of this Paragraph, the term sublease shall not include the rental of boat slips, dock lockers, dinghy racks, or dry storage spaces.

In the event of a consented-to assignment or sublease, if the parties cannot agree to an amount that is equal to the market rent, the rent shall be determined by the arbitration procedure described in Paragraph 3 herein, except that the award shall be effective and retroactive to the effective date of the assignment or sublease. Because of this provision, underpayment of rent, if any, shall be paid to Lessor within ten (10) days of the date that the market rent is determined by said arbitration procedure.

As a condition of Lessor's consent to assignment, Lessor may require a facilities condition inspection under Paragraph 15.1 of this Lease.

#### **10. DEFAULTS AND REMEDIES:**

- (a) **Defaults.** The occurrence of any one (1) or more of the following events shall constitute a default hereunder:
  - (1) **Abandonment of the Leased Premises.** Abandonment is herein defined to include, but is not limited to, any absence by Lessee from the Leased Premises for ten (10) consecutive days or longer.
  - (2) **Failure by Lessee to pay, when due, any Lease-required rent, other payment, and/or charge herein, where such failure continues for a period of ten (10) days after written notice thereof.** Provided, however, any such notice provided in this Paragraph 10(a)(2) or in subsequent Paragraph 10(a)(3) shall be in lieu of, and not in addition to, any notice required under Section 1161 of the California Code of Civil Procedure, as amended.
  - (3) **Failure by Lessee to perform any other express or implied covenants**



or conditions in this Lease (other than any breach under Paragraph 9, for which immediate notice of termination may be given), should such failure continue for thirty (30) days after written notice thereof; provided that, if such default is not reasonably susceptible of cure within said thirty (30) day period and Lessee has commenced action within said thirty (30) day period to cure the default and is diligently pursuing action to completion, such time period shall be extended by the time necessary to cure such default and further provided, in no event shall continue for a period in excess of Three Hundred Sixty-Five (365) days.

- (4) Subject to any restrictions or limitations placed on Lessor by applicable laws governing bankruptcy, Lessee's: (a) applying for, consenting to, or suffering the appointment of a receiver, trustee, or liquidator for all or a substantial portion of its assets; (b) making a general assignment for the benefit of creditors; (c) admitting in writing its inability to pay its debts or its willingness to be adjudged a bankrupt; (d) becoming unable to, or failing to, pay its debts as they mature; (e) being adjudged a bankrupt; (f) filing a voluntary petition or suffering an involuntary petition under any bankruptcy, arrangement, reorganization, or insolvency law (unless in the case of an involuntary petition, the same is dismissed within thirty (30) days of such filing); (g) convening a meeting of its creditors, or any class thereof, for purposes of effecting a moratorium, extension, or composition of its debts; or (h) suffering, or permitting to continue unstayed and in effect for ten (10) consecutive days, any attachment, levy, execution, or seizure of all or a substantial portion of Lessee's assets or of Lessee's interest in this Lease.

This Paragraph 10(a)(4) shall not be applicable or binding on the beneficiary of any deed of trust, mortgage, or other security instrument on the Leased Premises which is of record with Lessor and has been consented to by resolution of Lessor, or to said beneficiary's successors in interest consented to by resolution of Lessor, as long as there remains any monies to be paid by Lessee to such beneficiary under the terms of such deed of trust; provided that such beneficiary or its successors in interest, continuously and timely pays to Lessor all rent due or coming due under the provisions of this Lease and the Leased Premises are continuously and actively used in accordance with Paragraph 14 of this Lease, and provided that said beneficiary agrees in writing to assume and perform each and every obligation under the Lease.

(5) Failure by Lessee to comply with all time periods specified in this Lease, or Lessee's CDP as referenced in Section 5 of this Lease, should such failure continue for thirty (30) days after written notice thereof.

(6) Notwithstanding Paragraph 10(a)(5), failure by Lessee to timely comply with all other provisions of this Lease.

(b) Remedies. In the event of any default, Lessor may exercise the following remedies:

(1) Termination: Terminate Lessee's right to possession of the Leased Premises whereupon this Lease shall terminate and Lessee shall immediately surrender possession of the Leased Premises to Lessor. In such event, Lessor shall be entitled to recover from Lessee:

- (i) The "Worth at the Time of Award", as hereinafter defined, of the unpaid rent which had been earned at the time of termination;
- (ii) The "Worth at the Time of Award" of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided;
- (iii) The "Worth at the Time of Award" of the amount by which the unpaid rent for the balance of the term of this Lease after the time of award exceeds the amount of such loss that Lessee proves could have been reasonably avoided; and
- (iv) Any other amount necessary to compensate Lessor for all the detriment proximately caused by Lessee's failure to perform its obligations under this Lease, or which would ordinarily be likely to result therefrom, including but not limited to the cost of recovering possession of the Leased Premises, expenses of reletting (including necessary repair, renovation and alteration of the Leased Premises), reasonable attorneys' fees, and any other reasonable costs.

The "Worth at the Time of Award" of the amounts referred to in Paragraphs 10(b)(1)(i) and 10(b)(1)(ii) shall be computed by charging interest at ten percent (10%) per annum from the dates such amounts accrued to Lessor. The "Worth at the Time of Award" of the amount referred to in Paragraph 10(b)(1)(iii) shall be computed by discounting

such amount at one (1) percentage point above the Discount Rate of the Federal Reserve Bank of San Francisco at the time of the award.

- (2) **Reletting:** Without terminating or effecting a forfeiture of the Lease, or otherwise relieving Lessee of any obligation herein, Lessor may, but need not, relet the Leased Premises or any portion thereof, at any time or from time to time, for such terms and upon such conditions and rent as Lessor, in its sole discretion, deems proper. Regardless of whether the Leased Premises are relet, Lessee shall continue to pay to Lessor all Lease-required amounts up to the date that Lessor terminates Lessee's right to possession of the Leased Premises; provided, however, following a default, Lessor shall not unreasonably withhold its consent to any Lessee-requested assignment of this Lease or subletting of the Leased Premises, unless Lessor shall also elect to terminate this Lease and Lessee's right to possession of the Leased Premises, as provided in Paragraph 10(b)(1). Such payments shall be due at the times provided in this Lease and Lessor need not wait until the termination of the Lease to recover said amounts. If Lessor relets the Leased Premises, or any portion thereof, such reletting shall not relieve Lessee of any obligations herein, except that Lessor shall apply the rent or other proceeds actually collected for such reletting against amounts due from Lessee herein, to the extent such proceeds compensate Lessor for Lessee's nonperformance of any obligation herein. Lessor may execute any lease made pursuant thereto in its own name. Further, Lessor shall be under no obligation to reveal to new lessee how these proceeds were applied, nor shall said new lessee have any right to collect any such proceeds. Lessor shall not, by any reentry or other act, be deemed to have accepted Lessee's surrender of the Leased Premises or Lessee's interest therein, nor be deemed to have terminated this Lease or to have relieved Lessee of any obligation herein, unless Lessor shall have furnished Lessee with express written notice of Lessor's election to do so, as set forth herein.
- (3) **Other:** Any and/or all other rights or remedies of Lessor specified elsewhere in this Lease or provided by law.

In the event Lessor has consented to an encumbrance of this Lease for security purposes in accordance with Paragraph 8 of this Lease, it is understood and agreed that Lessor shall furnish copies of all notice(s) of default(s) to the beneficiary or mortgagee under said encumbrance by certified mail (provided Lessee has delivered to Lessor written request, therefore, together with the name and address of any such beneficiary or mortgagee) contemporaneously with the furnishing of such notices to Lessee. Furthermore, in the event Lessee fails to cure such default(s) within the time permitted herein, said beneficiary or mortgagee shall be permitted to cure such default(s) at any time within fifteen (15) days

following the expiration of the period within which Lessee may cure said default(s); provided, however, Lessor shall not be required to furnish any further notice(s) of default(s) to said beneficiary or mortgagee.

In the event this Lease is terminated pursuant to the provisions of this Paragraph 10, Lessor shall continue to have all rights provided in Paragraph 6 of this Lease.

Notwithstanding the foregoing, should a default not be cured within the cure periods referred to above, said Lease shall not be terminated as to said beneficiary or mortgagee unless Lessor first legally offers to enter into a valid lease with said beneficiary or mortgagee, and said offer is not accepted in writing within (30) days after said offer is made. Furthermore, such new lease must be entered into as a condition concurrent with such termination for the then-remaining term of this Lease. Furthermore, the new lease must contain the same terms, conditions, and priority as this Lease, provided the mortgagee or beneficiary promptly cures all then-existing defaults under this Lease when and to the extent it is able to cure them. Such new lease may be entered into even though possession of the Leased Premises has not been surrendered by the defaulting Lessee. In such event, unless legally restrained, Lessor shall promptly proceed to obtain possession of the Leased Premises and to deliver possession to said mortgagee or beneficiary as soon as the same is obtained. Should the mortgagee or beneficiary fail to accept said offer in writing within said thirty- (30) day period, or, having so accepted said offer, should it fail promptly to cure all existing defaults under this Lease when and to the extent it is able to cure them, then such termination shall also be effective as to said mortgagee or beneficiary.

**11. BANKRUPTCY:** Lessor shall have the right to declare this Lease in default if Lessee: (i) becomes insolvent; (ii) makes an assignment for the benefit of creditors; (iii) becomes the subject of a bankruptcy proceeding, reorganization arrangement, insolvency, receivership, liquidation, or dissolution proceeding; or in the event of any judicial sale of Lessee's leasehold interest.

The conditions of this Paragraph shall not be applicable or binding on : (1) Lessee; or (2) the beneficiary in any deed of trust, mortgage, or other security instrument encumbering the leasehold interest which Lessor has consented to in writing; or (3) the aforesaid beneficiary's successors in interest which Lessor has consented to in writing, as long as there remains any monies to be paid by Lessee to such beneficiary under the terms of such deed of trust; provided Lessee, such beneficiary, or such beneficiary's successors in interest, continuously pay to the Lessor all rent or coming due under the provisions of this Lease, and the Leased Premises are continuously and actively used in accordance with Paragraph 14 herein.

**12. EMINENT DOMAIN:** If any public authority takes the whole or a substantial part of the Leased Premises under the power of eminent domain, then the term of this Lease shall cease as to the part so taken, from the day the possession of that part that is taken. Further, the rent shall be paid up to that day. Lessee shall then have the right either to: (i)

cancel this Lease and declare the same null and void; or (ii) continue in possession of the remainder of the Leased Premises under the then-current Lease terms. Provided, however, the award shall be reduced in proportion to the value of the portion of the Leased Premises taken. All damages awarded for such taking shall belong to and be the property of Lessor whether such damages shall be awarded as compensation for diminution in value to the leasehold or to the fee of the Leased Premises. Provided, however, Lessor shall not be entitled to any award made for the taking of any of Lessee's installations or improvements on the Leased Premises.

**13. TERMINATION OF PRIOR AGREEMENT(S) :** Any and all existing permits, leases or rental agreements between Lessor and Lessee for the Leased Premises which have not already expired or terminated, are hereby terminated on the effective date of this Lease. Any rights, duties, and obligations of the parties, if any, pursuant to the terms, covenants, and conditions in any such hereby terminated agreements shall remain enforceable and subject to all defenses, including without limitation any applicable statute of limitations. Further, said statute shall not be waived or extended because of this Lease. Nothing herein is intended nor shall be construed as a waiver of any such rights, or as a release of any such duties or obligations, whether known or unknown at this time or upon the effective date of this Lease.

**14. USE OBLIGATION:** Lessee shall actively and continuously use and operate the Leased Premises for the limited particular exclusive use expressly provided for in Paragraph 2, herein, except for failure to so use caused by wars, strikes, riots, civil commotion, acts of public enemies, and acts of God. Said active and continuous use and operation enhances the value of the lands within Lessor's jurisdiction; provides needed public service; provides additional employment, taxes, and other benefits to the general economy of the area. Lessee, however, shall not and is expressly prohibited from using the Leased Premises for any other purpose or use whatsoever, whether it is purported to be in addition to or in lieu of the particular exclusive use expressly provided in Paragraph 2, herein.

**15. MAINTENANCE:** As part of the consideration for this Lease, Lessee shall assume full responsibility for operation and maintenance of the Leased Premises throughout the term and without expense to Lessor. Lessee's expenses for ordinary or scheduled maintenance will not qualify for an extension of this Lease. Lessee shall perform all maintenance, which includes all painting, repairs, and replacements necessary to maintain and preserve the Leased Premises in a good, safe, healthy, and sanitary condition, satisfactory to Lessor and in compliance with all applicable laws and consistent with, or superior to, the standard of maintenance in Lessee's industry or industries according to the uses allowed on the Premises. Provided, however, prior to Lessee performing any extraordinary repairs, plans and specifications must first be submitted to Lessor and receive Lessor approval, pursuant to the procedures provided in Paragraph 4 of this Lease. Further, Lessee shall provide approved containers for trash and garbage and keep the Leased Premises free and clear of rubbish, litter, or any other fire hazards. Lessee waives

all rights to make repairs at the expense of Lessor, as provided in Section 1942 of the California Civil Code, and all rights provided by Section 1941 of said Code.

Lessee shall, at all times during the term of this Lease, keep or cause to be kept, accurate and complete records of maintenance conducted on the Leased Premises. The records must be supported by source documents of original entry such as invoices, receipts, work orders, or other pertinent supporting documents. All Lessee's maintenance records related to business operations conducted within or from the Leased Premises, shall be kept either at the Leased Premises or at such other locations as are acceptable to Lessor. Lessor shall have the right at any and all reasonable times to examine said maintenance records, without restriction, for the purpose of determining Lessee's compliance with the maintenance obligations under this Lease.

For the purpose of keeping the Leased Premises in a good, safe, healthy, and sanitary condition, Lessor always shall have the right but not the duty to enter, view, inspect, determine the condition of, and protect its interests in the Leased Premises. Provided, however, Lessor or its representatives shall: (a) conduct such entry in a manner that causes the least inconvenience and disruption to Lessee's operation as practicable; and (b) comply with all safety and security requirements of Lessee. It is not intended, however, that Lessee's safety and security requirements be used to bar Lessor's right of inspection. Further, Lessee shall provide Lessor reasonable access to the Leased Premises for such purpose.

If inspection discloses the Leased Premises are not in the condition required by this Lease, then within ninety (90) days after receipt of written notice by Lessor, if inspection discloses the Leased Premises are not in the condition required herein, Lessee immediately must commence the necessary maintenance work within ten (10) calendar days after written notice from Lessor and diligently pursue said work to completion.

Should Lessee fail to diligently pursue commencement of the necessary maintenance work within ten (10) calendar days at Lessor's request, Lessor shall have the right to enter the premises and complete said work. Lessor may perform all maintenance, which includes all repairs and replacements necessary to maintain and preserve the Leased Premises in a good, safe, healthy, and sanitary condition, satisfactory to Lessor and in compliance with all applicable laws. Lessor may also complete extraordinary repairs in accordance with Lessor's then applicable policies and procedures.

For any and all repairs undertaken by Lessor in accordance with this Paragraph, and upon written demand, Lessee shall reimburse or pay in advance to Lessor all costs associated with said repairs including, but not limited to, cost of materials and labor at Lessor's actual cost. Said payments shall be paid to Lessor as additional rent due under this Lease, subject to the rent provisions of this Lease, and paid in monthly installments or in one lump sum at the sole discretion of Lessor. For all repairs undertaken by Lessor pursuant to this Paragraph, Lessee shall, to the fullest extent permitted by law, defend, indemnify, and hold

harmless Lessor and its officers, employees, and agents pursuant to Paragraph 21 of this Lease. Further, if at any time Lessor determines the Leased Premises are not in the condition required herein, Lessor may require Lessee to file and pay for a faithful performance bond to assure prompt correction, without additional notice. The amount of said bond shall be adequate, in Lessor's opinion, to correct all unsatisfactory conditions.

Notwithstanding, Lessor shall not be required to perform any maintenance, including painting, repairs, or replacements; or to make any improvements whatsoever on or for the benefit of the Leased Premises.

The rights reserved in this Paragraph shall not create any obligations or increase any obligations for Lessor elsewhere in this Lease, nor shall the exercise therefore limit any and all other rights or remedies of Lessor specified elsewhere in this Lease or provided by law.

**15.1 FACILITY CONDITION INSPECTIONS:** If Lessee is required to conduct a facility condition inspection under Paragraph 1.1 or Paragraph 9, then:

- (a) Lessee must notify Lessor in writing of the name and qualifications of at least one contractor experienced in the development and maintenance of docks, piers or marinas for Lessor's review and approval;
- (b) Lessor must approve or deny in writing Lessee's selected contractor within fourteen days from receipt of Lessee's written notification, otherwise Lessee's selection will be considered approved;
- (c) Lessee must inspect all of its waterside improvements through its Lessor-approved contractor and, based on the inspection, produce a detailed written inspection report that identifies:
  - (i) Deferred maintenance or replacement(s) which must be completed immediately to bring the waterside improvements into the condition required by this Lease; and
  - (ii) Future maintenance which must be completed to ensure that the waterside improvements remain in the condition required by this Lease over the next five (5) years.
- (d) Lessee must send to Lessor one original signed copy of the written inspection report for Lessor's review and approval at least ninety (90) days prior to Lessor's consent to assignment or approval of term extension;
- (e) Lessor must approve or provide comment to Lessee's inspection report within ten (10) business days from receipt of Lessee's submittal, otherwise Lessee's report will be considered approved; and,

- (f) Lessee must immediately commence and diligently pursue to completion all maintenance recommended in the written inspection report according to the recommended schedule, except maintenance Lessor may waive in writing.

**16. PERFORMANCE BOND:** Lessee shall not commence any major construction upon the Leased Premises until performance bonds in the amount of the total estimated construction cost of the proposed improvements have been secured and submitted to Lessor. In lieu of said performance bonds, the Executive Director of Lessor may, in his sole discretion, accept performance and labor and material bonds supplied by Lessee's contractor or subcontractors, performance guarantees, or other satisfactory evidence that said construction will be timely completed. Said bonds must be in a form acceptable to Lessor and have been issued by a company qualified to do business in the state of California.

**17. TAXES AND UTILITIES:** This Lease may result in a taxable possessory interest and be subject to the payment of property taxes. Lessee shall pay before delinquency all taxes and assessments of any kind assessed or levied upon Lessee or the Leased Premises by reason of: (i) this Lease; (ii) any buildings, machines, or other improvements of any nature whatsoever erected, installed, or maintained by Lessee; or (iii) the business or other activities of Lessee upon or in connection with the Leased Premises. Lessee also shall pay any fees imposed by law for licenses or permits for any business or activities of Lessee upon the Leased Premises, or under this Lease, and shall pay before delinquency any and all charges for utilities at or on the Leased Premises.

**18. CONFORMANCE WITH LAWS AND REGULATIONS:** Lessee agrees that, in all activities on or in connection with the Leased Premises, and in all uses thereof, including the making of any alterations, changes, installations, or other improvements, it will abide by and conform to all laws and regulations. Said laws and regulations shall include, but are not limited to those prescribed by the San Diego Unified Port District Act; any ordinances of the city in which the Leased Premises are located, including the Building Code thereof; and any ordinances and general rules of Lessor, including tariffs and any applicable laws of the state of California and federal government, as any of the same now exist or may hereafter be adopted or amended. In particular and without limitation, Lessee shall have the sole and exclusive obligation and responsibility to comply with the requirements of: (i) Article 10 of Lessor Code entitled "Stormwater Management and Discharge Control," and (ii) the Americans With Disabilities Act of 1990, including but not limited to regulations promulgated thereunder, and Lessor shall have no such obligations or responsibilities as to the Leased Premises.

**19. EQUAL EMPLOYMENT OPPORTUNITY AND NONDISCRIMINATION:** Lessee shall comply with Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1991; the California Constitution; the California Fair Employment and Housing Act; the Americans with Disabilities Act of 1990; and any other applicable federal, state, or local laws and regulations now existing or hereinafter enacted, requiring equal employment



opportunities or prohibiting discrimination. This shall include without limitation, laws and regulations prohibiting discrimination because of race, color, religion, sex, national origin, ancestry, physical or mental disability, veteran status, medical condition, marital status, age, sexual orientation, pregnancy, or other non-job related criteria. In complying with all such laws, including without limitation the Americans with Disabilities Act of 1990, Lessee shall be solely responsible for such compliance and required programs, and there shall be no allocation of any such responsibility between Lessor and Lessee.

Annually, Lessee shall formulate and file with Lessor an approved: (i) "Equal Employment Opportunity and Nondiscrimination Program," and (ii) "Statement of Compliance" for the promotion of equal employment opportunities and nondiscrimination. Lessee shall make such progress reports as required by Lessor, and, upon Lessor's reasonable notice, Lessee shall make available for inspection and copying all of its records relevant to compliance with this Paragraph. Provided, however, Lessee is only required to file the Program and Statement when the average annual employment level operating on the Leased Premises exceeds fifty (50) employees. Provided further, should Lessee be subject to a federally-mandated affirmative action program for employees, Lessee may, in lieu of filing the Program and Statement, annually certify in writing to Lessor that Lessee is subject to such a program, and, upon Lessor's request, Lessee shall furnish evidence thereof.

For the purposes and provisions of this Paragraph, a sublessee shall be considered the Lessee should the sublessee become the prime operator of the Leased Premises.

Lessee's compliance with this Paragraph is an express condition hereof, and any failure by Lessee to so comply and perform shall be a default as provided in this Lease, and Lessor may exercise any right as provided herein, and as otherwise provided by law.

**20. PARTIAL INVALIDITY:** If any term, covenant, condition, or provision of this Lease is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions herein shall remain in full force and effect, and shall in no way be affected, impaired, or invalidated thereby.

**21. HOLD HARMLESS:** Lessee shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless Lessor and its officers, employees, and agents for any and all liability, claims, judgments, damages, proceedings, orders, directives, costs, including reasonable attorneys' fees, or demands arising directly or indirectly out of the obligations undertaken in connection with this Lease, or Lessee's use, occupancy, possession or operation of the Leased Premises, except claims or litigation arising through the sole negligence or willful misconduct of Lessor. It is the intent of this Paragraph that Lessee indemnify and hold harmless Lessor for any actions of Lessee or Lessor, including duties that may be legally delegated to Lessee or to third parties, except for those arising out of the sole negligence or willful misconduct of Lessor. This indemnity obligation shall apply for the entire time that any third party can make a claim against or sue Lessor for liabilities

arising out of Lessee's use, occupancy, possession or operation of the Leased Premises, or arising from any defect in any part of the Leased Premises.

22. **SUCCESSORS IN INTEREST:** Unless otherwise provided in this Lease, the terms, covenants, conditions, and agreements herein shall apply to and bind the heirs, successors, executors, administrators, and assigns of all the parties hereto, all of whom shall be jointly and severally liable hereunder.

23. **EASEMENTS:** This Lease and all rights granted hereunder are subject to all easements and rights-of-way previously granted or reserved by Lessor in, upon, over, and across the Leased Premises for any purpose whatsoever. Said Lease and granted rights shall be subject to future easements, rights-of-way for access, gas, electricity, water, sewer, drainage, telephone, telegraph, television transmission, and such other Lessor or public facilities as Lessor may determine from time to time to be in the best interests of the development of the lands within Lessor's jurisdiction. Lessor agrees to make an effort to locate future easements and rights-of-way, and to install associated public facilities, so as to produce a minimum amount of interference with Lessee's business. Further, Lessee shall not be entitled to any monetary payment or other remuneration for any such future easements and rights-of-way.

24. **TITLE OF LESSOR:** Lessor's title is derived from the provisions of the San Diego Unified Port District Act, Appendix 1, Harbors & Navigation Code, and is subject to the provisions of said Act. This Lease is granted subject to the terms and conditions of said Act.

25. **INSURANCE:** Lessee shall maintain insurance acceptable to Lessor in full force and effect throughout the term of this Lease. The policies for said insurance shall, as a minimum, provide the following:

(a) Forms of Coverage.

- (1) "OCCURRENCE" form Commercial General Liability covering the Leased Premises, operations, and contractual liability assumed by Lessee in this Lease in the amount of not less than Two Million Dollars (\$2,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage. The general aggregate shall be Four Million Dollars (\$4,000,000) unless a Two Million Dollars (\$2,000,000) per location aggregate limit is provided separate by endorsement.

If alcoholic beverages are served or sold on the Leased Premises, Liquor Liability coverage in the amount of not less than Two Million Dollars (\$2,000,000) shall be obtained. If no alcoholic beverages are

served or sold on the Leased Premises, the proof of insurance shall so state.

- (2) Fire and Extended Coverage, including water damage and debris cleanup provisions, in an amount not less than ninety percent (90%) of full replacement value of all improvements located within the Leased Premises. The fire and extended coverage policies shall be endorsed with a Loss Payee endorsement in favor of Lessor. It is agreed that any insurance proceeds in excess of Twenty-Five Thousand Dollars (\$25,000) resulting from a loss under said policies shall be payable jointly to Lessor and Lessee to ensure that said proceeds will be reinvested in rebuilding and/or repairing the damaged portions of the Leased Premises and any damaged or destroyed improvements located thereon. Provided, however, if there is a Lessor-consented to mortgage or deed of trust encumbering the leasehold, then all fire and extended coverage policies shall be made payable jointly to the mortgagee or beneficiary and Lessee, to ensure that any proceeds shall be held by said mortgagee or beneficiary for the following purposes:
- (i) As a trust fund to pay for the reconstruction, repair, or replacement of the damaged or destroyed improvements, in kind and scope, in progress payments as the work is performed. Any funds remaining after completion of said work shall be retained by said mortgagee or beneficiary and applied to reduce any debt secured by such mortgage or deed of trust. Furthermore, any funds remaining after full payment of said debt shall be paid to Lessee; or
  - (ii) In the event that this Lease is terminated with consent of both Lessor and said mortgagee or beneficiary, and the improvements are not reconstructed, repaired, or replaced, the insurance proceeds shall be retained, without liability, by said mortgagee or beneficiary to the extent necessary to fully discharge the debt secured by said mortgage or deed of trust. Furthermore, said mortgagee or beneficiary shall hold the balance thereof to restore the Leased Premises to a neat and clean condition. Any remaining funds shall lastly be paid to Lessor and Lessee, as their interests may appear.
- (3) In the event underground storage tanks are located on the Leased Premises, Lessee is required to comply with Code of Federal Regulations, Title 40, Chapter I, Subchapter H or Title 23, Division 3, Chapter 18 of California Code of Regulations, collectively, herein "UST

Law." At the time Lessee is required to comply with any provisions of UST Law requiring financial assurance mechanisms, Lessee shall provide Lessor with a certified copy of its Certification of Financial Responsibility. If Lessee's program for financial responsibility requires insurance, then Lessee's policy(ies) shall name Lessor and its officers, employees, and agents as additional insureds, and all other terms of Subparagraph (b), below, shall apply. Should Lessee change its financial assurance mechanisms, Lessee shall immediately provide Lessor with a certified copy of its revised Certification of Financial Responsibility.

**(b) General Requirements**

- (1)** All required insurance shall be in force the first day of the term of this Lease, and shall be maintained continuously in force throughout the term of this Lease. In addition, the cost of all required insurance shall be borne by Lessee. During the entire term of this Lease, Lessee shall provide Lessor with Certificates, in a form acceptable to Lessor, evidencing the existence of the necessary insurance policies and original endorsements effecting coverage required by this Paragraph. The Certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind insurance on its behalf. Notwithstanding the foregoing, Lessor reserves the right to require complete, certified copies of all required policies at any time.
- (2)** All liability insurance policies shall name, or be endorsed to name Lessor and its officers, employees, and agents as additional insureds and protect Lessor and its officers, employees, and agents against any legal costs in defending claims. All liability policies shall provide cross-liability coverage. All insurance policies shall be endorsed to state that coverage will not be suspended, voided, cancelled, or reduced in coverage or in limits, except after Lessee has furnished Lessor with thirty (30) days' prior written notice by certified mail. All insurance policies shall be endorsed to state that Lessee's insurance is primary and not excess or contributory to any insurance issued in the name of Lessor. Further, all insurance companies must be satisfactory to Lessor.
- (3)** Any deductibles or self-insured retentions must be declared and acceptable to Lessor. If the deductibles or self-insured retentions are unacceptable to Lessor, then Lessee shall have the option to either: (i) reduce or eliminate such deductibles or self-insured retentions as respects the Lessor and its officers, employees, and agents; or, (ii)

procure a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses.

- (4) Lessor shall retain the right at any time to review the coverage, form, and amount of insurance required herein. If, in the opinion of Lessor, the insurance provisions in this Lease do not provide adequate protection for Lessor and/or members of the public using the Leased Premises or using services connected with Lessee's use or occupancy of the Leased Premises, Lessor may require Lessee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. Lessor's requirements shall be reasonable, but shall be designed to ensure protection from and against the kind and extent of risks that exist at the time a change in insurance is required.
- (5) Lessor shall notify Lessee in writing of changes in the insurance requirements. With respect to changes in insurance requirements that are available from Lessee's then-existing insurance carrier, Lessee shall deposit Certificates evidencing acceptable insurance policies with Lessor incorporating such changes within sixty (60) days of receipt of such notice. With respect to changes in insurance requirements that are not available from Lessee's then-existing insurance carrier, Lessee shall deposit Certificates evidencing acceptable insurance policies with Lessor, incorporating such changes, within one hundred twenty (120) days of receipt of such notice. In the event Lessee fails to deposit insurance Certificates as required herein, this Lease shall be in default without further notice to Lessee, and Lessor shall be entitled to exercise all legal remedies.
- (6) If Lessee fails or refuses to maintain insurance as required in this Lease, or fails to provide proof of insurance, Lessor has the right to declare this Lease in default without further notice to Lessee, and Lessor shall be entitled to exercise all legal remedies.
- (7) The procuring of such required policies of insurance shall not be construed to limit Lessee's liability hereunder, nor to fulfill the indemnification provisions and requirements of this Lease. Notwithstanding said policies of insurance, Lessee shall be obligated for the full and total amount of any damage, injury, or loss caused by negligence or neglect connected with this Lease, or with the use or occupancy of the Leased Premises.
- (8) Lessee agrees not to use the Leased Premises in any manner, even if use is for purposes stated herein, that will result in the cancellation of any insurance Lessor may have on the Leased Premises or on

adjacent premises, or that will cause cancellation of any other insurance coverage for the Leased Premises or adjoining premises. Lessee further agrees not to keep on the Leased Premises or permit to be kept, used, or sold thereon, anything prohibited by any fire or other insurance policy covering the Leased Premises. Lessee shall, at its sole expense, comply with all reasonable requirements for maintaining fire and other insurance coverage on the Leased Premises.

26. **POLICY OF LESSOR:** It is Lessor's policy that prevailing wage rates shall be paid all persons employed on the lands within Lessor's jurisdiction.

27. **WARRANTIES-GUARANTEES-COVENANTS:** Lessor makes no warranty, guarantee, covenant, including but not limited to covenants of title and quiet enjoyment, or averment of any nature whatsoever concerning the condition of the Leased Premises, including the physical condition thereof, or any condition which may affect the Leased Premises. It is agreed that Lessor will not be responsible for any loss, damage, and/or costs, which may be incurred by Lessee by reason of any such condition or conditions.

28. **DAMAGE TO OR DESTRUCTION OF LEASED PREMISES:** Should Lessee-owned improvements be: (i) damaged or destroyed by fire, the elements, acts of God, or by any other cause; or (ii) declared unsafe or unfit for occupancy or use by a public entity with the appropriate authority, (i) and/or (ii) hereinafter "event," Lessee shall, within ninety (90) days of such event, commence and diligently pursue to completion the repair, replacement, or reconstruction of the improvements necessary to permit full occupancy and use of the Leased Premises for the uses required herein. Repair, replacement, or reconstruction of such improvements shall be accomplished in a manner and according to Plans approved by Lessor. Provided, however, Lessee shall not be obligated to repair, reconstruct, or replace the improvements following their destruction in whole or substantial part, except to the extent the loss is covered by insurance required pursuant to Paragraph 25 herein (or would be covered regardless of whether such required insurance is actually in effect).

If Lessee elects not to restore, repair, or reconstruct as herein required, then this Lease shall terminate. Further, Lessor shall have any rights to which it would be entitled under the provisions of Paragraph Nos. 6 and 25 herein.

No event described herein shall relieve Lessee of its obligations to pay all rent and other amounts otherwise due hereunder.

29. **QUITCLAIM OF LESSEE'S INTEREST UPON TERMINATION:** Upon termination of this Lease for any reason, including but not limited to termination because of default by Lessee, Lessee shall execute, acknowledge, and deliver to Lessor within thirty (30) days after receipt of written demand therefore a good and sufficient deed whereby all Lessee's right, title, and interest in the Leased Premises is quitclaimed to Lessor. Should Lessee fail

or refuse to deliver the required deed to Lessor, Lessor may prepare and record a notice reciting the failure of Lessee to execute, acknowledge, and deliver such deed. Said notice shall be conclusive evidence of the termination of this Lease and of all right of Lessee, or those claiming under Lessee, in and to the Leased Premises.

**30. PEACEABLE SURRENDER:** Upon expiration of this Lease or earlier termination or cancellation thereof, as herein provided, Lessee shall peaceably surrender the Leased Premises to Lessor in as good condition as the Leased Premises were at the Commencement Date of this Lease, except as the Leased Premises were repaired, rebuilt, restored, altered, or added to as permitted or required by the provisions of this Lease, ordinary wear and tear excepted, and subject to Paragraph 6 herein. If Lessee fails to surrender the Leased Premises at the expiration of this Lease or the earlier termination or cancellation thereof, Lessee shall defend and indemnify Lessor from all liability and expense resulting from the delay or failure to surrender, including, without limitation, any succeeding Lessee claims based on Lessee's failure to surrender.

**31. WAIVER:** Should either Lessor or Lessee waive any breach by the other of any Lease covenant, condition, or agreement, such waiver shall not be, nor be construed to be, a waiver of any subsequent or other breach of the same or any other Lease covenant, condition, or agreement. Further, failure on the part of either party to require or exact the other's full and complete compliance with any of the Lease covenants, conditions, or agreements shall not be, nor be construed as in any manner changing the terms, or preventing the enforcement in full, of the provisions hereof. In addition, Lessor's subsequent acceptance of rent hereunder shall not be deemed to be a waiver of any preceding Lessee breach of any Lease term, covenant, or condition, other than Lessee's failure to pay the particular rent so accepted, regardless of Lessor's knowledge of Lessee's preceding breach at the time rent is accepted.

**32. HOLDOVER:** This Lease shall terminate without further notice at expiration of the term. Any holding over by Lessee after either expiration or termination shall not constitute a renewal or extension, or give Lessee any rights in or to the Leased Premises.

If Lessee, with Lessor's consent, remains in possession of the Leased Premises after Lease expiration or termination, such possession shall be a month-to-month tenancy terminable on thirty (30) days notice furnished at any time by either party to the other. In addition, all provisions of this Lease, except those pertaining to term, shall apply to the month-to-month tenancy, and Lessee shall continue pay all rent required by this Lease. Provided, however if percentage rent is required by the Lease, it shall be paid monthly on or before the tenth (10<sup>th</sup>) day of each month, including the tenth (10<sup>th</sup>) day of the month following the expiration of any such holdover period.

**33. PARAGRAPH HEADINGS:** The Table of Contents and Paragraph Headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision thereof.

34. **ENTIRE UNDERSTANDING:** This Lease contains the entire understanding and agreement of the parties. Lessee acknowledges there is no other written or oral understanding or agreement between the parties with respect to the Leased Premises, and that this Lease supersedes all prior negotiations, discussions, obligations, and rights of the parties hereto. No waiver, modification, amendment, or alteration of this Lease shall be valid unless it is expressly in writing and signed by authorized representatives of the parties hereto. Each of the parties to this Lease acknowledges that no other party, agent or representative of any other party, has made any promise, representation, waiver, or warranty whatsoever, expressed or implied, which is not expressly contained in writing in this Lease. Each party further acknowledges it has not executed this Lease in reliance upon any collateral promise, representation, waiver, or warranty, or in reliance upon any belief as to any fact not expressly recited in this Lease.

35. **TIME IS OF THE ESSENCE:** Time is of the essence of each and all of the terms and provisions of this Lease. This Lease shall inure to the benefit of and be binding upon the parties hereto and any successors of Lessee as fully and to the same extent as though specifically mentioned in each instance. All covenants, conditions, and agreements in this Lease shall extend to and bind any assigns and sublessees of Lessee.

36. **NOTICES:** All notices provided for by this Lease or by law to be given or served upon Lessor or Lessee shall be in writing and: (i) personally served upon Lessor or Lessee, or any person hereafter authorized by either party in writing to receive such notice, or (ii) served by certified letter addressed to the appropriate address hereinafter set forth, or to such other address designated in writing by the respective party.

To Lessor  
Executive Director  
San Diego Unified Port District  
Post Office Box 120488  
San Diego, CA 92112-0488

To Lessee  
Raymond Carpenter  
2145 East Belt Street  
San Diego, CA 92113  
-AND-  
San Diego California Properties, LLC  
c/o Arthur Engel  
1311 First Street  
Coronado, CA 92118

Should any consented-to assignee, consented-to purchaser, or Consented-to-Lender notify Lessor in writing of its desire to receive notices, such party shall also be personally served, or served by certified letter at such appropriate address designated in writing by the respective party.

Any notice or notices given or served as provided herein shall be effectual and binding for all purposes upon the parties so served; provided, however, if served by certified mail,



service will be considered completed and binding on the party served forty-eight (48) hours after deposit in the U.S. Mail.

37. **REMOVAL OF MATERIALS:** Lessee shall, upon expiration of this Lease or sooner termination as herein provided, remove within sixty (60) days all materials, including without limitation all ships, vessels, barges, hulls, debris, and surplus and salvage items, hereinafter "Materials," from the Leased Premises and adjacent property, so as to leave the same in as good condition as when first occupied by Lessee, subject to reasonable wear and tear. Provided, however, that if Lessee fails to remove all Materials within sixty (60) days, Lessor may remove, sell, or destroy said Materials at the expense of Lessee. Further, Lessee agrees to pay Lessor the reasonable cost of such removal, sale, or destruction; or, at the option of Lessor, said Materials not removed, sold, or destroyed by Lessee shall become the property of Lessor, without cost to Lessor, and without any payment to Lessee.

During any period of time required to remove said Materials or to test for and/or remediate Hazardous Materials as required in Paragraph 42 herein, Lessee shall continue to pay the full rent to Lessor in accordance with this Lease, which said rent shall be prorated daily.

38. **WASTE/NUISANCE:** Lessee shall not use the Leased Premises in a manner that constitutes waste or nuisance.

39. **NUMBER AND GENDER:** Words of any gender used in this Lease shall include any other gender and each word in the singular number shall include the plural whenever the tense requires.

40. **APPLICABLE LAW:** The Lease will be governed by and construed and enforced in accordance with the laws of the State of California.

41. **ATTORNEY FEES:** Should any suit be commenced to enforce, protect or establish any right or remedy of any of the terms and conditions hereof, including without limitation a summary action commenced by Lessor under the laws of the state of California relating to the unlawful detention of property, the prevailing party shall be entitled to have and recover from the losing party reasonable attorney fees and costs of suit.

42. **HAZARDOUS MATERIALS:**

- (a) Definition of "Hazardous Material." The term "Hazardous Material" shall mean any pollutant, contaminant, or hazardous, dangerous, or toxic chemical, material, or substance, including oil and petroleum products, which now or in the future may be within the meaning of any applicable, federal, state, or local law, regulation, ordinance, or requirement at any concentration that is or has become regulated by the United States, the State of California, or any local government authority having jurisdiction over the Leased Premises.

- (b) **Lessee Use of Hazardous Materials.** Lessee shall not cause or permit any Hazardous Material, or products or materials which include any hazardous substance as a component, to be generated, brought onto, used, stored, emitted, released or disposed of in or about the Leased Premises by Lessee or its agents, employees, contractors, sublessees, or invitees unless expressly approved, at Lessor's sole discretion, in writing by Lessor after submittal by Lessee of Material Safety Data Sheets ("MSDS") or other information requested by Lessor. Limited quantities of equipment, materials and supplies customarily used in connection with the construction of improvements and standard office, food service and janitorial supplies customarily used in places of business which contain chemicals categorized as Hazardous Material are excluded from this requirement. Lessee shall use, store, and dispose of all such Hazardous Materials in strict compliance with all applicable statutes, ordinances, regulations, and other requirements in effect during the Lease Term that relate to public health and safety and protection of the environment ("Environmental Laws"); and shall comply at all times with all Environmental Laws.
- (c) **Notice of Release or Investigation.** If during the term of this Lease (including any extensions), Lessee becomes aware of (i) any actual or threatened release of any Hazardous Material on, in, under, from, or about the Leased Premises; or (ii) any inquiry, investigation, proceeding, or claim (collectively "Inquiry") by any government agency or other person regarding the presence of any Hazardous Material on, in, under, from or about the Leased Premises, Lessee shall give Lessor written notice of the release or Inquiry within five (5) days after Lessee learns or first has reason to believe there has been a release or Inquiry and shall simultaneously furnish to Lessor copies of any claims, notices of violation, reports, warning or other writings received by Lessee that concern the release or Inquiry.
- (d) **Lessor Right to Inspect.** If Lessee has in the past or continues to use, dispose, generate, or store Hazardous Materials on the Leased Premises, Lessor or its designated representatives, at Lessor's sole discretion, may at any time during the term of this Lease, but is not obligated to, enter upon the Leased Premises and make any inspections, tests or measurements Lessor deems necessary to determine if a release of Hazardous Materials has occurred. Lessor shall furnish Lessee a minimum of twenty-four (24) hours' notice in writing prior to conducting any inspections or tests, unless, in Lessor's sole judgment, circumstances require otherwise. Such tests shall be conducted in a manner so as to attempt to minimize any inconvenience and disruption to Lessee's operation as is practicable. If such tests indicate a release of Hazardous Materials, then Lessor, at Lessor's sole discretion, may require Lessee, at Lessee's sole expense and at any time during the term of this Lease, to have such tests for such Hazardous Materials conducted by a

qualified party or parties on the Leased Premises. If Lessor has reason to believe any Hazardous Materials originated from a release on the Leased Premises have contaminated any area outside the Leased Premises, including but not limited to surface and groundwater, then Lessor, at Lessor's sole discretion, may require Lessee, at Lessee's sole expense and at any time during the term of this Lease, to have tests for such Hazardous Materials conducted by a qualified party or parties on said area outside the Leased Premises. Lessor's failure to inspect, test or take other actions pursuant to this Paragraph 42(d) regarding the Leased Premises, shall in no way relieve Lessee of any responsibility for a release of a Hazardous Material.

- (e) Clean-up Obligations. If the presence of any Hazardous Material brought onto the Leased Premises by Lessee or Lessee's employees, agents, sublessees, contractors, or invitees, or generated by same during the term of this Lease results in contamination of the Leased Premises, adjacent properties or the San Diego Bay, Lessee shall promptly take all necessary actions, at Lessee's sole expense, to remove or remediate such Hazardous Materials. Lessee shall provide notice to Lessor prior to performing any removal or remedial action. Lessee shall not propose nor agree to any covenant of use restriction as part of any removal or remediation required as a result of this Paragraph 42(e). To the extent Lessor incurs any costs or expenses in performing Lessee's obligation to clean-up contamination resulting from Lessee's operations or use of the Leased Premises, Lessee shall promptly reimburse Lessor for all costs and expenses incurred within thirty (30) days. Any amounts not so reimbursed within thirty (30) days after Lessee's receipt of an itemized statement therefore shall bear interest at the Prime Rate plus Five Percent (5%) per annum compounded monthly. This provision does not limit the indemnification obligation set forth in Paragraph 42(f). The obligations set forth in this Paragraph 42(e) shall survive any expiration or other termination of this Lease.

- (l) Clean-up Extending Beyond Lease Term. Should any clean-up of Hazardous Materials for which Lessee is responsible not be completed prior to the expiration or sooner termination of the Lease, including any extensions thereof, then: (A) Lessee shall deposit into an escrow account an amount of money equal to the balance of the estimated costs of the clean-up, together with instructions for the disbursement of such amount in payment of the costs of any remaining clean-up as it is completed, and (B) if the nature of the contamination or clean-up required of Lessee is of such a nature as to make the Leased untenable or unleaseable, then Lessee shall be liable to Lessor as a holdover lessee until the clean-up has been sufficiently completed to make the Leased Premises suitable for lease to third parties. The estimated cost of the clean-up shall require approval of the Lessor.

- (ii) **Financial Security.** If Lessor determines, in its reasonable discretion, that Lessee does not have insurance or other financial resources sufficient to enable Lessee to fulfill its obligations under this Paragraph 42 (e) , whether or not accrued, liquidated, conditional, or contingent, then Lessee shall, at the request of Lessor, procure and thereafter maintain in full force and effect such environmental impairment liability and/or pollution liability insurance policies and endorsements, or shall otherwise provide such collateral or security reasonably acceptable to Lessor as is appropriate to assure that Lessee will be able to perform its duties and obligations hereunder.
- (f) **Indemnification.** Lessee shall, at Lessee's sole expense and with counsel reasonably acceptable to Lessor, indemnify, defend, and hold harmless Lessor and Lessor's directors, officers, employees, partners, affiliates, agents, successors, and assigns with respect to all losses, including reasonable attorneys' and environmental consultants' fees, arising out of or resulting from Hazardous Material contamination in, on, under or about the Leased Premises, (with the sole exceptions set forth in Paragraph 44 [b] and [c] herein) or the violation of any Environmental Law, by Lessee or Lessee's agents, assignees, sublessees, contractors, or invitees. This indemnification applies whether or not the concentrations of any such Hazardous Material is material, the concentrations exceed state or federal maximum contaminant or action levels, or any government agency has issued a cleanup or other order. This indemnification shall survive the expiration or termination of this Lease. This indemnification includes, but is not necessarily limited to:
  - (i) Losses attributable to diminution in the value of the Leased Premises;
  - (ii) Loss or restriction of use of rentable space(s) in the Leased Premises;
  - (iii) Adverse effect on the marketing of any space(s) in the Leased Premises;
  - (iv) All other liabilities, obligations, penalties, fines, claims, actions (including remedial or enforcement actions of any kind and administrative or judicial proceedings, orders, or judgments), damages (including consequential and punitive damages), and costs (including attorney, consultant, and expert fees and expenses) resulting from the release or violation; and,
  - (v) All costs (including reasonable attorneys' fees, consulting fees and subcontracted costs) incurred by Lessor in undertaking any assessment or remediation of the Leased Premises that might not

have been fully resolved by Lessee by the time this Lease terminates or expires.

Lessor shall have a direct right of action against Lessee even if no third party has asserted a claim. Furthermore, Lessor shall have the right to assign said indemnity. The obligations set forth in this Paragraph 42(f) shall survive any expiration or other termination of this Lease.

- (g) Termination of Lease. Upon the expiration or earlier termination of the term of the Lease, Lessee shall: (i) cause all Hazardous Materials previously owned, stored, or used by Lessee to be removed from the Leased Premises and disposed of in accordance with all applicable provisions of law; (ii) remove any underground or aboveground storage tanks or other containers installed or used by Lessee, or its predecessors, to store any Hazardous Material on the Leased Premises, and repair any damage to the Leased Premises caused by such removal; (iii) cause any soil or other portion of the Leased Premises which has become contaminated by any Hazardous Material stored or used by Lessee, or its predecessors, to be decontaminated, detoxified, or otherwise cleaned-up in accordance with the applicable requirements of any relevant government authorities; and (iv) surrender possession of the Leased Premises to Lessor free of contamination attributable to Hazardous Materials generated or used by Lessee or stored or disposed of by any party other than Lessor in or on the Leased Premises during the term of this Lease.

#### 43. STORAGE TANKS:

- (a) Underground Storage Tanks. No underground storage tanks ("USTs") shall be permitted to be installed on the Leased Premises during the term of this Lease without the prior written consent of the Lessor's Executive Director in his or her sole and absolute discretion. In the event Lessee obtains such approval to install a UST on the Leased Premises, Lessee shall be responsible for complying with all laws and regulations pertaining to such UST, including tank monitoring of such UST as required by the County of San Diego Hazardous Material Management Division (HMMD) or any other responsible agency. Lessee further agrees to take responsibility for reporting unauthorized releases from USTS to HMMD and the Lessor within twenty-four (24) hours of such unauthorized release. Lessee will be responsible for all fees and costs related to the unauthorized release of any Hazardous Material including, but not limited to: investigative, surface and groundwater clean-up, and expert and agency fees. Lessee shall maintain evidence of financial responsibility for taking corrective action and for compensating third parties for bodily injury and/or property damage caused by a release from a UST. Lessee further agrees to be responsible for maintenance and repair of

the USTs; obtaining tank permits; filing a business plan with HMMD or other responsible agency; and for paying UST fees, permit fees, and other regulatory agency fees relating to USTs.

Lessee agrees to keep complete and accurate records on the Leased Premises for a period of not less than thirty-six (36) months from the applicable events including, but not limited to, permit applications, monitoring, testing, equipment installation, repairing and closure of the USTs, and any unauthorized releases of Hazardous Materials. Lessee also agrees to make such records available for Lessor or responsible agency inspection. Lessee further agrees to include a copy of Health and Safety Code, Chapter 6.7, Section 25298, as part of any agreement between Lessee and any operator of USTs.

Furthermore, Lessee shall be responsible for compliance with all other laws and regulations presently existing, or hereinafter enacted, applicable to USTs, including without limitation any such laws and regulations which alter any of the above requirements.

- (b) **Aboveground Storage Tanks.** No aboveground storage tanks ("ASTs") shall be permitted to be installed on the Leased Premises during the term of this Lease without the prior written consent of the Lessor's Executive Director in his or her sole and absolute discretion. In the event Lessee obtains such approval to install an AST, Lessee shall be responsible for complying with all laws and regulations pertaining to such AST. Lessee shall, in accordance with this Lease and applicable laws and regulations, secure and pay for all necessary permits and approvals, prepare a spill prevention control counter measure plan and conduct periodic inspections to ensure compliance therewith, including conformance with the latest version of said applicable laws and regulations. In addition, Lessee shall maintain and repair said tanks to conform and comply with all other applicable laws and regulations for ASTs, including without limitation all of the requirements of Health & Safety Code, Chapter 6.67, Sections 25270 through 25270.13 as presently existing or as hereinafter amended, including without limitation conducting daily visual inspection of said tanks, allowing the San Diego Regional Water Quality Control Board ("SDRWQCB"), Lessor, and/or responsible agency, to conduct periodic inspections. Lessee also shall comply with valid orders of the SDRWQCB, filing the required storage tank statement and payment of the fee therefore, establishing and maintaining the required monitoring program and systems, reporting spills as required, and payment of lawfully imposed penalties as provided therein and as otherwise provided by law. The Lessee shall be responsible for all costs associated with any unauthorized release from ASTs, including but not limited to, investigative, surface and groundwater clean-up, and expert and agency fees.

#### 44. ENVIRONMENTAL DISCLOSURES:

- (a) Lessee's Warranties: Lessee represents and warrants to Lessor that Lessee has conducted or been encouraged and allowed to conduct a full inspection of each parcel of the Leased Premises, and has not been denied access to any area thereof. Lessee has had a complete right and full opportunity to bring experts onto the Leased Premises and to conduct all tests Lessee believes to be necessary to determine the condition of the Leased Premises. Lessee is charged with full knowledge of Environmental Laws and Lessee's review and investigation of the condition of the Leased Premises and, to the extent Lessee has elected to do so, has included consideration of the applicability and effect of such laws and regulations. In particular, Lessee has investigated or been encouraged to investigate, to Lessee's own satisfaction, the environmental condition of the soil, surface water, groundwater, sediments and structures on the Leased Premises. Lessee specifically acknowledges that it is not relying on any representation or warranties of any kind whatsoever, express or implied, from Lessor as to any matters concerning the environmental condition of the Leased Premises or. Lessee further specifically acknowledges that Lessor has no knowledge regarding the environmental condition of the Leased Premises above and beyond that contained in the documents identified in (b) below (which documents shall not be construed as expressed or implied warranties or representations of any kind by Lessor) and that, despite the ability to conduct further testing of the Leased Premises, Lessee has chosen instead to solely rely on existing data (both its own and that contained in public documents) to evaluate the environmental condition of the Leased Premises.
- (b) Lessee Disclosure. Lessee acknowledges and agrees that the Leased Premises is located adjacent to the San Diego Convention Center which operates twenty-four (24) hours per day and seven (7) days per week. Lessee also acknowledges and agrees that past uses made of portions of the Leased Premises included a ship repair facility, a marine service station, a marine contractor's yard and other uses which may have resulted in the generation, disposal or release of Hazardous Materials on, in, under or about the Leased Premises. Lessee further acknowledges and accepts that the Leased Premises may have groundwater monitoring wells required by the RWQCB that will need to be in continuous operation until their removal is approval by RWQCB and any other governmental agency having jurisdiction. Lessee also acknowledges receipt of (i) California Regional Water Quality Control Board Clean-Up and Abatement Order No. 95-21 dated May 24, 1995 together with Addendum No. 1, Addendum No. 2 dated November 12, 1997 and Addendum No. 3 dated June 15, 2001 (collectively "CAO"); (ii) Agreement for Joint Exercise of Powers between Lessor and the Redevelopment Agency for the City of San Diego bearing Lessor Document No. 41617; (iii) Polanco Redevelopment Act

Remediation Agreement between RWQCB and Lessor bearing Lessor Document No. 41840; (iv) PTI Environmental Services Campbell Shipyard Sediment Characterization, Volumes I and II dated June 1991; (v) Ecosystems Management Associates, Inc. Campbell Shipyard NPDES Permit Marine Sediment Monitoring and Reporting Annual Report dated August 1998; (vi) Hart Crowser, Inc. Phase II Soils Characterization Report for Campbell Shipyard dated February 2001; (vii) Kleinfelder, Inc. Remedial Action Workplan for Campbell Shipyard dated December 6, 2000; (viii) Weston Remediation of Former Campbell Shipyard Closeout Report dated June 2002; (ix) Ninyo & Moore Limited Historical Study San Diego Bay Waterfront dated April 20, 2001; (x) Hart Crowser, Inc., Volumes I and II, Final Phase II Sediment Characterization Report for Campbell Shipyard dated May 25, 2001; (xi) AMEC Fifth Avenue Landing Underground Storage Tank Investigation dated July 2, 2001; (xii) URS Study of Seawall Evaluation at Campbell Shipyard Site dated September 26, 2001; (xiii) AMEC Historical Review of Analytical Data Collected at Fifth Avenue Landing dated October 28, 2001; (xiv) Ninyo & Moore Dissolved Metals Groundwater Analytical Results for Vicinity of 8<sup>th</sup> Avenue dated February 22, 2002; (xv) Blaylock Engineering Group Structural Inspection of Campbell Shipyard Seawall dated July 16, 2002; (xvi) Anchor Environmental, LLC Campbell Shipyard Data Gap Sediment Field Sampling Report dated September 19, 2002; (xvii) Ninyo & Moore Groundwater Monitoring Report for Former Campbell Shipyard dated April 18, 2003; (xviii) Anchor Environmental, LLC Campbell Shipyard Sediment Cap-in-Place Alternative Analysis dated June 2003; and (xix) Ninyo & Moore Limited Subsurface Assessment for Spinnaker Hotel Site dated July 31, 2003. Lessee further hereby acknowledges, as provided in Paragraph 49, that the Leased Premises and is being leased in an "AS-IS, WITH ALL FAULTS" condition. Notwithstanding the foregoing sentence, Lessee shall not be liable for any damages, claims, costs or expenses that arise solely as a result of releases from the former operations of Campbell Industries, General Petroleum Corporation of California and Mobil Oil Corporation on the Leased Premises ("Existing Contaminants"), including without limitation, any remediation costs required to comply with the CAO referenced above, except those costs and expenses (including attorney's fees) that arise as a result of Lessee being named as a responsible party or defendant based on allegations regarding Lessee's own operations and as specifically provided herein in subparagraphs (d), (e), and (f) below. With the sole exception set forth in the preceding sentence, it is the parties' intent and Lessee understands and agrees that all other Hazardous Materials on the Leased Premises, if any, whether existing prior to or subsequent to the Commencement Date shall be Lessee's sole responsibility.

- (c) Parcel No. 3: Lessee acknowledges and agrees that Parcel No. 3 is adjacent to and contiguous with property the past uses of which have included all of those past uses identified in Paragraph 44(b) above, any or all of which uses may



have resulted in a release of Hazardous Materials on, in or about Parcel No. 3. To the best of Lessor's knowledge, however, Lessor has not received any written notice of any material proceedings, action, or other claim for liability arising under any Environmental Law from any person or governmental body regarding Parcel No. 3 of the Leased Premises with the exception of the California Regional Water Quality Control Board ("Regional Board") Clean-Up and Abatement Order No. 95-21, dated May 24, 1995, and addendums ("CAO") issued to the former Campbell Industries. The CAO included an analysis of the sediment data from Parcel No. 3. Lessor will itself, or through responsible parties, complete the remediation required for rescission of the CAO. Rescission of the CAO will constitute acceptance by the Regional Board of the conditions of the Leased Premises, including Parcel No. 3, that were evaluated in the CAO. The regulatory review process for the Parcel No. 3 sediment is summarized in a September 23, 2003 Memorandum entitled "Fifth Avenue Landing Sediment" authored by Paul Brown, Project Analyst in the Lessor's Recreation & Environmental Services Department, addressed to Karen Weymann, Assistant Director in the Lessor's Real Estate Department, a copy of which is on file in Lessor's Real Estate Department. The parties hereby agree that to the extent a cleanup may be required on all or a portion of Parcel No. 3 under the CAO to respond to Existing Contaminants, Lessee shall not be liable for the costs required to comply with the CAO, as specifically set forth in Paragraph 44(b). Notwithstanding the foregoing, it is the parties' intent that Lessee shall be liable, pursuant to the provisions set forth in Paragraph 45 herein, for the presence or release of Hazardous Materials in, on, under or about Parcel No. 3 as a result of Lessee's construction on, or use, operation or occupancy of, the Leased Premises.

- (d) Remedial Investigations and Remedial Work. As the above-referenced CAO indicates, the RWQCB has assumed the role of lead agency for mitigation of releases of Existing Contaminants. Lessor intends to undertake and complete all necessary investigations of releases of Existing Contaminants and associated remedial work, as required by RWQCB under the CAO, sufficient to satisfy RWQCB that the goals and objectives of the approved Remedial Action Plan ("RAP") and CAO have been or can be accomplished. Such remedial work may be premised on a risk-based corrective action approach. Lessor may pursue cost recovery actions against those parties responsible for releases of Existing Contaminants and, if any recovery is made, Lessor shall be entitled to retain all funds obtained through such actions and Lessee disclaims all rights, if any, to any such funds. Lessee hereby grants to Lessor (and Lessor's contractors), the right to enter the Leased Premises to investigate, test for and remove Existing Contaminants at the Lessor's sole cost.
- (e) Residual Impacts. Lessee acknowledges and accepts that not all Hazardous Materials will necessarily be removed from the Leased Premises following

completion of activities described in the RAP and CAO, even after issuance of the closure letter(s). Lessee understands that although the Leased Premises will be prepared to a condition in which impacts have been mitigated to a level where the Leased Premises meet the requirements of the CAO, some Hazardous Materials (including Existing Contaminants) may remain at the Leased Premises, at or below concentrations consistent with the regulatory guidelines in the CAO ("Residual Impacts"). Lessee acknowledges and agrees that, should Lessee, its successor or assigns determine or desire to undertake construction or additional development activities at the Leased Premises, any increased costs related to development by reason of such Hazardous Materials (including Residual Impacts) shall be borne by Lessee, its successors and assigns and Lessor will assume no responsibility therefore.

- (f) Waste Removal. Although Existing Contaminants on, in, under or about the Leased Premises have been, or will be, remediated by Lessor as required by the CAO, Lessee hereby acknowledges that subsequent excavation of soils from the Leased Premises, if applicable, could result in exportation of a regulated waste, requiring appropriate characterization, handling, transport and disposal (together "Regulated Waste Removal"). Lessor takes no responsibility and assumes no liability whatsoever for Regulated Waste Removal. Accordingly, Lessee hereby waives any claim, or potential claim, it may have to recover costs or expenses arising out of or associated with Regulated Waste Removal and agrees to indemnify, defend and hold harmless Lessor from and against any and all claims, liabilities, losses, damages, costs, and expenses arising from, out of, or in any way related to Regulated Waste Removal.
- (g) Worker Protection. Lessor accepts no liability or responsibility for ensuring that Lessee's workers, including without limitation those conducting testing, construction and maintenance activities, on the Leased Premises is satisfactorily protected from Hazardous Materials (including Residual Impacts as defined above) as required in Title 29 of the Code of Federal Regulations or similar State requirements. Lessee shall assess all human health risks from vapor transport or direct contact with Hazardous Materials and incorporate such engineering and institutional controls as may be required to sufficiently protect human health of onsite workers and transient visitors. Lessee hereby waives any claim, or potential claim, it may have to recover any damages, losses, costs and expenses related to worker exposure or alleged exposure to any onsite contamination and to indemnify, defend and hold harmless Lessor from and against any and all such claims, liabilities, losses, damages, costs, and expenses.
- (h) Additional Lessee Disclosure. Lessee further hereby acknowledges that additional environmental documentation, studies and activities subsequent to the environmental documentation, studies and activities listed herein are available for review at the Office of the District Clerk upon request.

**45. "AS-IS" LEASE AND WAIVERS:** Lessee's execution of the Lease shall fully and finally constitute:

- (a) **Lessee's Acknowledgment.** Lessee's acknowledgment that Lessor has given to Lessee sufficient opportunity to consider, inspect and review, to Lessee's complete satisfaction (1) any and all rights, appurtenances, entitlements, obligations, and liabilities concerning the Leased Premises; (2) the physical condition of the Leased Premises, including, without limitation, the condition of the soils, subsoil media, sediments, surface waters and groundwaters at or under the Leased Premises; (3) the effect upon the Leased Premises of any and all applicable federal, state or local statutes, ordinances, codes, regulations, decrees, orders, laws or other governmental requirements (collectively, "Applicable Laws"); (4) the development potential of the Leased Premises including (without limitation on the preceding clause (3)) the effect of all Applicable Laws concerning land use, zoning, environmental quality and maintenance, endangered species, and traffic regulation; (5) the financial prospects of the Leased Premises and local market conditions, (6) Lessee's determination of the feasibility of Lessee's intended use and enjoyment of the Leased Premises ; and (7) all other facts, circumstances, and conditions affecting, concerning or relating to the Leased Premises. The land use; the environmental, biological, physical and legal condition of the Leased Premises; the feasibility of Lessee's intended use and enjoyment of the Leased Premises and such other facts, circumstances and conditions being collectively referred to herein as the "Condition of the Leased Premises "; and, without limitation on any other provision of this Lease, Lessee expressly assumes the risk that adverse conditions affecting the Leased Premises have not been revealed by Lessee's investigations.
- (b) **Only Lessor's Express Written Agreements Binding.** Lessee acknowledges and agrees that no person acting on behalf of Lessor is authorized to make, and that except as expressly set forth in this Lease, neither Lessor nor anyone acting for or on behalf of Lessor has made, any representation, warranty, statement, guaranty or promise to Lessee, or to anyone acting for or on behalf of Lessee, concerning the Condition of the Leased Premises or any other aspect of the Leased Premises. Lessee further acknowledges and agrees that no representation, warranty, agreement, statement, guaranty or promise, if any, made by any person acting on behalf of Lessor which is not expressly set forth in this Lease will be valid or binding on Lessor.
- (c) **As-Is Lease.** Lessee further acknowledges and agrees that Lessee's execution of this Lease shall constitute Lessee's representation, warranty and agreement that the Condition of the Leased Premises has been independently verified by Lessee to its full satisfaction, and that, except to the extent of the express covenants of Lessor set forth in this Lease, Lessee will be leasing the Leased Premises based solely upon and in reliance on its own inspections, evaluations, analyses and conclusions, or those of Lessee's representatives; and that LESSEE IS LEASING THE LEASED PREMISES IN ITS "AS-IS, WITH ALL FAULTS" AND STATE OF REPAIR INCLUSIVE OF ALL FAULTS AND DEFECTS, WHETHER KNOWN OR UNKNOWN, AS MAY EXIST AS OF THE LESSEE'S EXECUTION OF THIS LEASE. Without limiting the scope or generality of the foregoing, Lessee expressly assumes

the risk that the Leased Premises do not or will not comply with any Applicable Laws now or hereafter in effect.

**(d) Waivers, Disclaimers and Indemnity.**

**(i) Waiver and Disclaimer.** Lessee hereby fully and forever waives, and Lessor hereby fully and forever disclaims, all warranties of whatever type or kind with respect to the Leased Premises, whether expressed, implied or otherwise including, without limitation, those of fitness for a particular purpose, tenant ability, habitability or use.

**(ii) Lessor's Materials.** Lessee further acknowledges that any information and reports including, without limitation, any engineering reports, architectural reports, feasibility reports, marketing reports, soils reports, environmental reports, analyses or data, or other similar reports, analyses, data or information of whatever type or kind which Lessee has received or may hereafter receive from Lessor or its agents or consultants have been furnished without warranty of any kind except as specifically set forth herein and on the express condition that Lessee will make its own independent verification of the accuracy, reliability and completeness of such information and that Lessee will not rely thereon. Accordingly, subject to terms of Paragraph 45(e) below, Lessee agrees that under no circumstances will it make any claim against, bring any action, cause of action or proceeding against, or assert any liability upon, Lessor or any of the persons or entities who prepared or furnished any of the above information or materials as a result of the inaccuracy, unreliability or incompleteness of, or any defect or mistake in, any such information or materials and Lessee hereby fully and forever releases, acquits and discharges Lessor and each person furnishing such information or materials of and from, any such claims, actions, causes of action, proceedings or liability, whether known or unknown.

**(e) Release and Waiver.**

**(i) Release.** Except to the extent of Claims (as defined below) against Lessor arising from any breach by Lessor of its covenants and obligations expressly provided in this Lease, Lessee, on behalf of Lessee, its successors and assigns, hereby fully and forever releases, acquits and discharges Lessor of and from, and hereby fully forever waives:

Any and all claims, actions, causes of action, suits, proceedings, demands, rights, damages, costs, expenses, losses, judgments, provisional relief, fines, penalties, and fees, including, without limitation, any and all claims for compensation, reimbursement, or contribution whatsoever (individually and collectively, "Claims"), whether known or unknown, direct or indirect, foreseeable or unforeseeable, absolute or contingent, that Lessee or any of Lessee's successors or assigns now has or may have or which may arise or be asserted in the future arising out of, directly or indirectly, or in any way connected with: (A) any act or omission of Lessor (or any person acting for or on behalf of Lessor or for whose conduct Lessor may be liable), whether or

not such act be the passive or sole negligence of Lessor, in connection with prior ownership, maintenance, operation or use of the Leased Premises; (B) any condition of environmental contamination or pollution at the Leased Premises (including, without limitation, the contamination or pollution of any soils, sediments, subsoil media, surface waters or groundwaters at the Leased Premises); (C) to the extent not already included in (B), above, the prior, present or future existence, release or discharge, or threatened release, of any Hazardous Materials at the Leased Premises, (including, without limitation, the release or discharge, or threatened release, of any Hazardous Materials into the air at the Leased Premises or into any soils, subsoils, surface waters or groundwaters at the Leased Premises); (D) the violation of, or noncompliance with, any Environmental Law or other Applicable Law now or hereafter in effect, however and whenever occurring; (E) the condition of the soil at the Leased Premises; (F) the condition of any improvements located on the Leased Premises including, without limitation, the structural integrity and seismic compliance of such improvements; (G) any matters which would be shown on an accurate ALTA land survey of the Leased Premises (including, without limitation, all existing easements and encroachments, if any); (H) all Applicable Laws now or hereafter in effect; (I) matters which would be apparent from a visual inspection of the Leased Premises, or (J) to the extent not already covered by any of the foregoing clauses (A) through (I), above, the use, maintenance, development, construction, ownership or operation of the Leased Premises by Lessor or any predecessor(s)-in-interest in the Leased Premises of Lessor.

- (ii) Waiver of Civil Code Section 1542. With respect to all releases made by Lessee under or pursuant to this Paragraph 45, Lessee hereby waives the application and benefits of California Civil Code § 1542 and hereby verifies that it has read and understands the following provision of California Civil Code § 1542:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Lessee: 

**46. JOINT AND SEVERAL LIABILITY:** If Lessee, as a party to this Lease, is a partnership; joint venture; or is comprised of more than one party or entity, or a combination thereof, the obligations imposed on Lessee under this Lease shall be joint and several, and each general partner, joint venture, party or entity of Lessee shall be jointly and severally liable for said obligations. Furthermore, nothing herein shall be deemed or construed as creating a partnership or joint venture between Lessor and Lessee, or between Lessor and any other entity or party, or cause Lessor to be responsible in any way for the debts or obligations of Lessee, or any other party or entity.

**47. SECURITY DEPOSIT:** A security deposit in the sum of Twenty Eight Thousand Five Hundred Dollars (\$28,500) shall be provided Lessor by Lessee, on or before the Commencement Date of this Lease. The security deposit shall be held by Lessor and used for the purpose of remedying Lessee's defaults under this Lease.

Except as provided below, the security deposit shall be in the form of an Irrevocable Stand-By Letter of Credit drawn on a bank having a branch located in San Diego County or having a Moody's Long Term Letter of Credit rating of single A or higher and a Moody's Long Term Deposit rating of single A or higher. The principal sum shall be made payable to Lessor. Each Letter of Credit provided during the term of this Lease shall be valid for a minimum of twelve (12) months from date of issuance. Provided, however, when the remaining term of this Lease is one (1) year or less, the Letter of Credit shall be valid for a minimum of three (3) months beyond the Termination Date of this Lease. If a Letter of Credit is not valid for the entire remaining term of this Lease plus three (3) months beyond, then such Letter of Credit shall be extended or renewed at least ninety (90) days prior to its expiration.

All or any portion of the principal sum of the Letter of Credit shall be available unconditionally to Lessor for the purposes and uses provided herein. The bank, and the form and provisions of the Letter of Credit shall be acceptable to the Executive Director of Lessor, in his sole discretion, and if not so acceptable, may be rejected. The Letter of Credit and Drawing Certificate shall not be acceptable if it requires Lessor to send written notice of default or request or demand payment from Lessee after default, prior to Lessor drawing on any funds under the Letter of Credit.

Notwithstanding the above, if said security deposit or the cumulative total amount of security deposits required by Lessor under this Lease and other leases, permits and agreements between Lessor and Lessee does not exceed Twenty-Five Thousand Dollars (\$25,000), Lessee may elect to provide said security deposit in the form of cash.

The amount of the security deposit may be adjusted from time to time at the discretion of the Executive Director of Lessor. Following any such adjustment, the amount of the security deposit may not exceed the greater of: (i) three (3) months' flat rent, or (ii) the annual average of three (3) months' percentage rent if this Lease provides for percentage rent. In the event the amount of the security deposit is increased, Lessee shall submit the additional security deposit within thirty (30) days of notification of the increase.

Lessee shall maintain the required security deposit continuously throughout the Lease term. Failure to do so shall be deemed a default and shall be grounds for immediate termination of this Lease in accordance with Paragraph 10 herein.

The security deposit or the remaining portion thereof, shall be rebated, released, assigned, surrendered, or endorsed to Lessee or order, as applicable, upon expiration or earlier termination of this Lease.

**48. DISPUTE RESOLUTION:** Except for (i) a dispute or disagreement as to the amount of rent that Lessee is to pay Lessor or (ii) a default in the payment of rent, all other disputes or disagreements between or among the parties arising out of or relating to the terms, conditions, interpretation, performance, default or any other aspect of this Lease, such parties shall first attempt to resolve the dispute informally. In the event the dispute is not resolved informally, prior to and as a precondition to the initiation of any legal action or proceeding, the parties shall refer the dispute to mediation before a retired State or Federal judge mutually selected by the parties. The dispute shall be mediated through informal, nonbinding joint conferences or separate caucuses with an impartial third party mediator who will seek to guide the parties to a consensual resolution of the dispute. The mediation proceeding shall be conducted within thirty (30) days (or any mutually agreed longer period) after referral, and shall continue until any party involved concludes, in good faith, that there is no reasonable possibility of resolving the dispute without resort to a legal action or proceeding. All costs of the mediation shall be shared equally by the parties involved. Each party shall bear its own attorneys' fees and other costs incurred in connection with the mediation. In the event the parties are unable to resolve the dispute through mediation, in addition to any other rights or remedies, any party may institute a legal action.

**49. RELOCATION OF PARCEL NO. 1:** At such time as the San Diego Convention Center Corporation ("SDCCC") provides Lessor written notice of its intention to exercise its Expansion Option, Lessor and SDCCC will diligently and in good faith negotiate a lease agreement (the "Expansion Lease") based upon Lessor's usual and customary lease form, subject to approval by the Board of Port Commissioners, and in accordance with the terms and conditions described in Exhibit "E" to the Amended, Restated and Combined Lease between Lessor and SDCCC dated April 6, 2010, on file in the Office of the Clerk of Lessor bearing Document No. 56486. The Expansion Lease shall include the relocation of Lessee's water transportation center. Upon completion of said negotiations, Lessor will amend this Lease, subject to the approval of the Board of Port Commissioners, to remove Parcel No. 1 from the Leased Premises; upon such removal, there will be no reduction in rent.

**MEMORANDUM OF LEASE**

50. **MEMORANDUM OF LEASE:** This is the final Paragraph and Memorandum of Lease, hereinafter "Memorandum," dated May 7, 2010, between SAN DIEGO UNIFIED PORT DISTRICT, Lessor, and FIFTH AVENUE LANDING, LLC, Lessee, concerning the Leased Premises described in Exhibits "A" and "B," attached hereto and by this reference made a part hereof.

For good and adequate consideration, Lessor leases the Leased Premises to Lessee, and Lessee hires them from Lessor, for the term and on the provisions contained in the Lease dated May 7, 2010, including without limitation provisions prohibiting assignment, subleasing, and encumbering said leasehold without the express written consent of Lessor in each instance, all as more specifically set forth in said Lease, which said Lease is incorporated in this Memorandum by this reference.

The term is twenty (20) years, beginning March 2, 2010 and ending February 28, 2030 including two (2) options to extend this Lease for five (5) years each for a total maximum term of thirty (30) years.

This Memorandum is not a complete summary of the Lease. Provisions in this Memorandum shall not be used in interpreting the Lease provisions. In the event of conflict between this Memorandum and other parts of the Lease, the other parts shall control. Execution hereof constitutes execution of the Lease itself.

Port Attorney

SAN DIEGO UNIFIED PORT DISTRICT

By [Signature] By Karen Jane Weymann  
DEPUTY PORT ATTORNEY Director, Real Estate

FIFTH AVENUE LANDING, LLC

Raymond A. Carpenter, Member

By RA Carpenter  
Raymond A. Carpenter

San Diego California Properties, LLC, Member

By [Signature]  
Arthur E. Engel, Member



## **GUARANTY**

RAYMOND CARPENTER, ARTHUR ENGEL, HERBERT ENGEL and DAVID ENGEL, hereinafter "Guarantor," whose address is 1311 First Street Coronado, CA , as a material inducement to and in consideration of the SAN DIEGO UNIFIED PORT DISTRICT, hereinafter "Lessor," entering into a written Lease, hereinafter "the Lease" with FIFTH AVENUE LANDING, LLC, hereinafter "Lessee," dated the same date as this Guaranty, pursuant to which Lessor leased to Lessee, and Lessee leased from Lessor, premises located in the city of San Diego, County of San Diego, California, in accordance with the Lease on file in the Office of the Clerk of Lessor, Document No. 56494, attached to this Guaranty, and made a part of it, unconditionally guarantees and promises to and for the benefit of Lessor, that Lessee shall perform the provisions of the Lease for which it is responsible.

If Guarantor is more than one person, Guarantor's obligations are joint and several, and are independent of Lessee's obligations. A separate action may be brought or prosecuted against any Guarantor, whether the action is brought or prosecuted against any other Guarantor, Lessee, or all, or whether any other Guarantor, Lessee, or all are joined in the action.

Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this Guaranty.

The provisions of the Lease may be changed by agreement between Lessor and Lessee at any time, without the consent of or without notice to Guarantor. The Guarantor shall guaranty the performance of the Lease, as changed. Assignment of the Lease (as permitted by the Lease) shall not affect this Guaranty. Lessor's failure or delay in the enforcement of any of its rights also shall not affect this Guaranty.

If Lessee defaults under the Lease, Lessor can proceed immediately against Guarantor, Lessee, or both, or Lessor can enforce against Guarantor, Lessee, or both, any rights that it has under the Lease or pursuant to applicable laws. If the Lease terminates and Lessor has any rights it can enforce against Lessee after termination, Lessor can enforce those rights against Guarantor without giving prior notice to Lessee, Guarantor, or both, or without making any demand on either of them.

Guarantor waives the right to require Lessor to: (1) proceed against Lessee; (2) proceed against or exhaust any security that Lessor holds from Lessee; or (3) pursue any other remedy in Lessor's power. Guarantor waives any defense by reason of any disability of Lessee, and waives any other defense based on the termination of Lessee's ability from any cause.

Until all Lessee's obligations under the Lease have been discharged in full, Guarantor has no right of subrogation against Lessee. Guarantor waives: (i) its right to enforce any remedies that Lessor now has, or later may have, against Lessee; (ii) any right to participate in any security now or later held by Lessor; (iii) all presentments, demand for performance, notices of nonperformance, protests, notices of protest, notices of dishonor, and notices of acceptance of this Guaranty; and (iv) all notices of the existence, creation, or incurrence of new or additional obligations.

If Lessor is required to enforce Guarantor's obligations by legal proceedings, Guarantor shall pay Lessor all costs incurred, including but not limited to reasonable attorney fees.

Guarantor's obligations under this Guaranty shall be binding on any successor of Guarantor. As used herein, a successor of Guarantor shall mean any assignee, transferee, personal representative, heir, or other person or entity succeeding lawfully, and pursuant to the provisions of said Lease, to the rights or obligations of Guarantor. Also as used herein, Lessor shall mean Lessor's successors and assigns, if any.

RAYMOND CARPENTER

DATED: 4-26, 2010

Signature: RA Carpenter

ARTHUR ENGEL

DATED: 4-26, 2010

Signature: Arthur Engel

HERBERT ENGEL

DATED: 4-26, 2010

Signature: Herbert Engel

DAVID ENGEL

DATED: 4-26, 2010

Signature: David Engel

(FOR USE BY SAN DIEGO UNIFIED PORT DISTRICT)

STATE OF CALIFORNIA)

COUNTY OF SAN DIEGO)

On MAY 11 2010 before me, Ralph M. Carpio, Notary Public, personally appeared Karen J. Weymann, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature

(Seal)

OPTIONAL

Though the information below is not required by law, it may prove valuable to person relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: Lease to Fifth Avenue Landing, LLC

Document Date: May 7, 2010 - May 6, 2030

Number of Pages: 72

Signer(s) Other Than Named Above: Raymond A. Carpenter, Arthur E. Engel

Capacity(ies) Claimed by Signer(s)

Signer's Name \_\_\_\_\_

- ☐ Individual
- ☐ Corporate Officer -- Title(s): \_\_\_\_\_
- ☐ Partner -- ☐ Limited ☐ General
- ☐ Attorney in Fact
- ☐ Trustee
- ☐ Guardian or Conservator
- ☐ Other: \_\_\_\_\_

Signer is Representing: \_\_\_\_\_

Top of thumb here

Signer's Name \_\_\_\_\_

- ☐ Individual
- ☐ Corporate Officer -- Title(s): \_\_\_\_\_
- ☐ Partner -- ☐ Limited ☐ General
- ☐ Attorney in Fact
- ☐ Trustee
- ☐ Guardian or Conservator
- ☐ Other: \_\_\_\_\_

Signer is Representing: \_\_\_\_\_

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(FOR USE BY GUARANTOR)

(STATE OF CALIFORNIA)

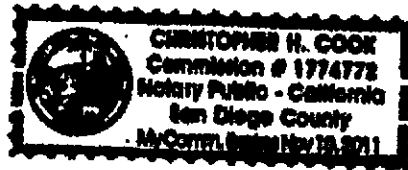
(COUNTY OF SAN DIEGO)

On APRIL 26, 2010 before me, CHRISTOPHER H. COOK Notary Public, personally appeared ARTHUR E. ENGEL, HERBERT ENGEL & DAVID R. ENGEL who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

*Chrl H Cook*



OPTIONAL

Though the information below is not required by law, it may prove valuable to the person(s) relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document: SDUPD LEASE TO FIFTH AVE LANDING  
Title or Type of Document:

Document Date: COMMENCING MARCH 2, 2010 Number of Pages: 60

Signer(s) Other Than Named Above: RAY CARPENTER

Capacity(ies) Claimed by Signer(s)

<p>Signer's Name _____</p> <p><input type="checkbox"/> Individual</p> <p><input type="checkbox"/> Corporate Officer - Title(s): _____</p> <p><input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General</p> <p><input type="checkbox"/> Attorney in Fact</p> <p><input type="checkbox"/> Trustee</p> <p><input type="checkbox"/> Guardian or Conservator</p> <p><input type="checkbox"/> Other: _____</p> <p>Signer is Representing: _____</p>	<p>Signer's Name _____</p> <p><input type="checkbox"/> Individual</p> <p><input type="checkbox"/> Corporate Officer - Title(s): _____</p> <p><input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General</p> <p><input type="checkbox"/> Attorney in Fact</p> <p><input type="checkbox"/> Trustee</p> <p><input type="checkbox"/> Guardian or Conservator</p> <p><input type="checkbox"/> Other: _____</p> <p>Signer is Representing: _____</p>
<p>Top of thumb here</p>	<p>Top of thumb here</p>

(FOR USE BY GUARANTOR)

(STATE OF CALIFORNIA)

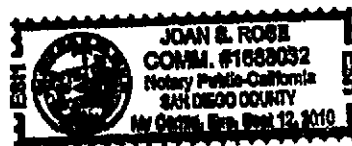
(COUNTY OF SAN DIEGO)

On 4-26-10 before me Joan S. Rose, Notary  
Public, personally appeared Raymond A. Carpenter,  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s)  
is/are subscribed to the within instrument and acknowledged to me that he/she/they executed  
the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the  
instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the  
instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Joan S. Rose



OPTIONAL

Though the information below is not required by law, it may prove valuable to the person(s) relying on the document  
and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

Capacity(ies) Claimed by Signer(s)

<p>Signer's Name _____</p> <p><input type="checkbox"/> Individual</p> <p><input type="checkbox"/> Corporate Officer - Title(s): _____</p> <p><input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General</p> <p><input type="checkbox"/> Attorney in Fact</p> <p><input type="checkbox"/> Trustee</p> <p><input type="checkbox"/> Guardian or Conservator</p> <p><input type="checkbox"/> Other: _____</p> <p>Signer is Representing: _____</p>	<p>Top of thumb here</p>	<p>Signer's Name _____</p> <p><input type="checkbox"/> Individual</p> <p><input type="checkbox"/> Corporate Officer - Title(s): _____</p> <p><input type="checkbox"/> Partner - <input type="checkbox"/> Limited <input type="checkbox"/> General</p> <p><input type="checkbox"/> Attorney in Fact</p> <p><input type="checkbox"/> Trustee</p> <p><input type="checkbox"/> Guardian or Conservator</p> <p><input type="checkbox"/> Other: _____</p> <p>Signer is Representing: _____</p>	<p>Top of thumb here</p>
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**EXHIBIT "A"**

**Lease Description for  
FIFTH AVENUE LANDING, LLC  
TIDELAND LEASE  
Parcel / Drawing No 019-084  
Within Corporate Limits of San Diego**

All that certain portion of land conveyed to the San Diego Unified Port District by that certain Act of Legislature of the State of California pursuant to Chapter 67, Statutes of 1962, First Extraordinary Session, as amended, and delineated on that certain Miscellaneous Map No. 584, filed in the Office of the San Diego County Recorder on May 28, 1976, File No. 76-164886, in the City of San Diego, County of San Diego, State of California, and more particularly described as follows:

**PARCEL NO. 1 (Land Area)**

Commencing at a 3" diameter brass disk monument stamped S.D.U.P.D. No. 14 as shown on R.O.S. No. 16888, filed in the Office of the County Recorder of San Diego County July 25, 2000; thence leaving said monument South 81°44'26" East a distance of 132.21 feet (calculated) to a point on the southwesterly face of curb of a street commonly known as Convention Way; thence along said face of curb line South 50°19'08" East a distance of 427.66 feet the TRUE POINT OF BEGINNING of Parcel No. 1; thence continuing along said face of curb line South 50°19'08" East a distance of 196.62 feet; thence leaving said face of curb line South 39°40'52" West a distance of 193.00 feet to a point on the U.S. Bulkhead Line as said U.S. Bulkhead Line is now established for the Bay of San Diego and delineated on map entitled "Harbor Lines, San Diego Bay, California File No. (D.O. series) 426" approved by the Secretary of the Army, April 29, 1963, and filed in the Office of the District Engineer, Los Angeles, California; thence leaving said U.S. Bulkhead Line and continuing South 39°40'52" West a distance of 1.00 foot to a point hereinafter known as Point "A"; thence parallel with said U.S. Bulkhead Line North 50°19'08" West a distance of 84.00 feet; thence North 39°40'52" East a distance of 1.00 foot to said U.S. Bulkhead Line; thence leaving said U.S. Bulkhead Line North 39°40'52" East a distance of 110.00 feet; thence North 50°19'08" West a distance of 112.62 feet; thence North 39°40'52" East a distance of 83.00 feet to the TRUE POINT OF BEGINNING of Parcel No. 1, containing 25,843 square feet or 0.59 acre of tidelands area.

**PARCEL NO. 2 (Water Area)**

Commencing at the above-described Point "A", said point also being the TRUE POINT OF BEGINNING of Parcel No. 2; thence South 39°40'52" West a distance of 288.67 feet; thence North 50°19'08" West a distance of 381.81 feet to a point on the northeasterly boundary line of an area now under lease to C.H.L.N., Inc.; thence along said C.H.L.N., Inc. northeasterly boundary line North 12°18'56" West a distance of

**EXHIBIT "A"**

58.08 feet; thence North 34°19'03" West a distance of 79.80 feet; thence North 45°53'02" West a distance of 25.21 feet; thence North 50°19'08" West a distance of 79.84 feet; thence North 39°40'52" East a distance of 29.86 feet; thence South 50°19'08" East a distance of 48.04 feet; thence North 39°40'52" East a distance of 188.00 feet; thence parallel with said U.S. Bulkhead Line South 50°19'08" East a distance of 179.41 feet; thence North 39°40'52" East a distance of 1.00 feet; thence parallel with said U.S. Bulkhead Line South 50°19'08" East a distance of 381.61 feet to the TRUE POINT OF BEGINNING of Parcel No. 2, containing 155,429 square feet or 3.57 acres of water covered area.

**PARCEL NO. 3 (Water Area)**

Commencing at the above-described Point "A", said point also being the TRUE POINT OF BEGINNING of Parcel No. 3; thence parallel with said U.S. Bulkhead Line South 50°19'08" East a distance of 400.00 feet; thence South 39°40'52" West a distance of 518.00 feet; thence North 50°19'08" West a distance of 400.00 feet; thence North 39°40'52" East a distance of 518.00 feet to the TRUE POINT OF BEGINNING of Parcel No. 3, containing 207,800 square feet or 4.77 acres of water covered area.

ALSO: Reserving therefrom a City of San Diego Water easement 15.00 feet in width as delineated and described as Easement No. 2 on sheets 2 and 3 of Drawing 019-084.

ALSO: Reserving therefrom a City of San Diego Storm Drain easement 20.00 feet in width as delineated and described as Easement No. 3 on sheets 2 and 3 of Drawing 019-084.

ALSO: Reserving therefrom an easement for Public Pedestrian Access 25.00 feet in width as delineated and described as Easement No. 4 on sheets 2 and 3 of Drawing 019-084.

ALSO: Reserving therefrom a City of San Diego Water easement 30.00 feet in width as shown On City of San Diego Dwg. No. 11558-36-D and lying within Parcel No. 1 as delineated and described as Easement No. 5 on sheets 2 and 3 of Drawing 019-084.

ALSO: Reserving therefrom a City of San Diego Storm Drain easement 30.00 feet in width lying within Parcel No. 2 as delineated and described as Easement No. 6 on sheets 2 and 3 of Drawing 019-084.


ALSO: Reserving therefrom an easement for Public Pedestrian Access 24.00 feet in width as delineated and described as Easement No. 8 on sheets 2 and 3 of Drawing 019-084.

ALSO: Reserving therefrom a Public Pedestrian Access easement 35.00 feet in width lying within Parcel No. 1 as delineated and described as Easement No. 9 on sheets 2 and 3 of Drawing 019-084.

**EXHIBIT "A"**

The above described tidelands lease and reservation areas are those delineated on San Diego Unified Port District Drawing No. 019-084 dated 18 March 2010, and made a part of this agreement.

All bearings and distances in the above legal description are grid, and based upon the California Coordinate System, Zone 6, N.A.D. 83, Epoch 1991.35.

 3-18-2010  
Gary L. Hus Date  
L.S. 7019





**EXHIBIT "B"**



EXHIBIT "B"

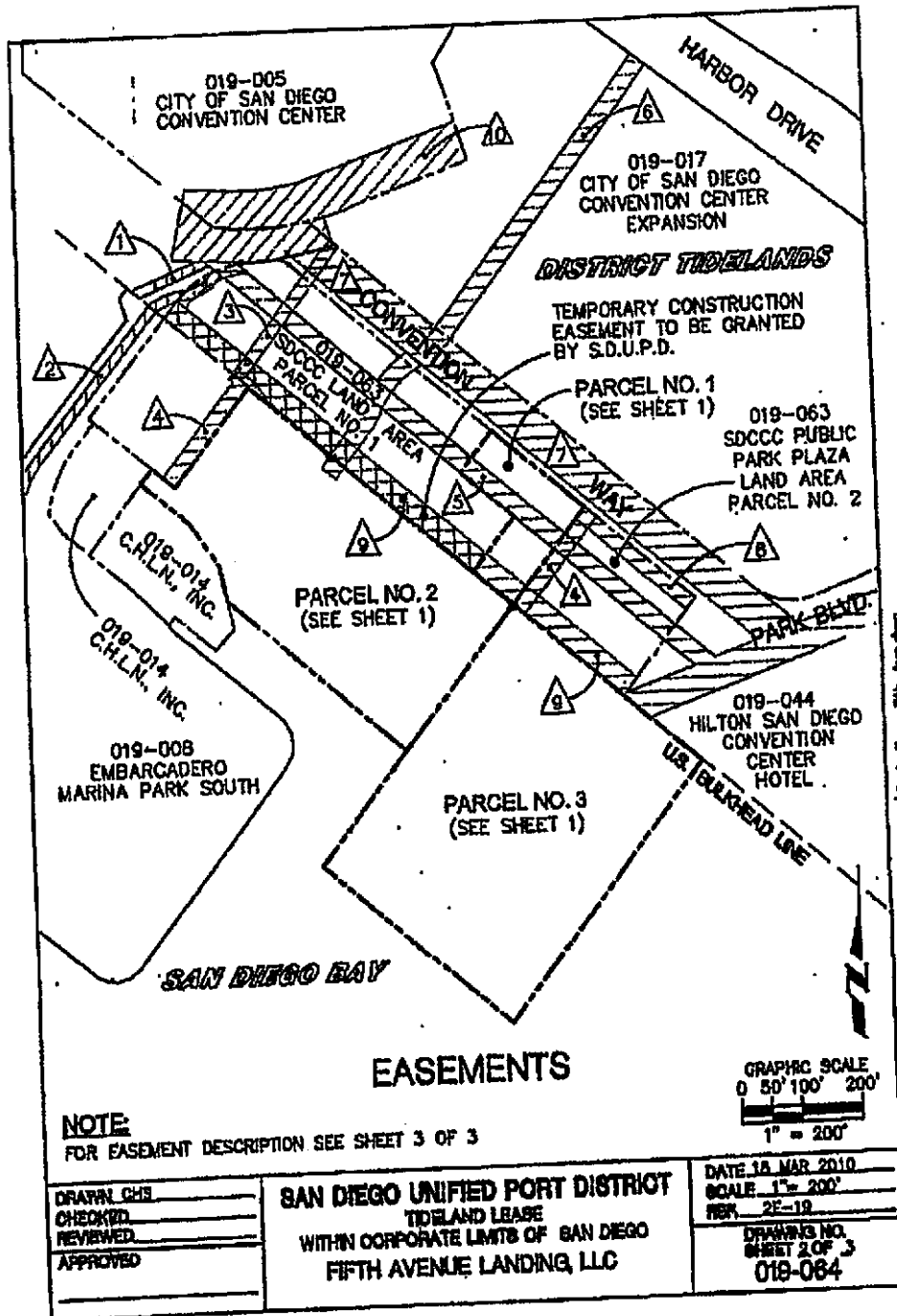


EXHIBIT "B"

TRAVERSE DATA

- |                       |                       |
|-----------------------|-----------------------|
| ① S50°19'08"E-196.62' | ⑫ N39°40'52"E-29.96'  |
| ② S39°40'52"W-193.00' | ⑬ S50°19'08"E-48.04'  |
| ③ S39°40'52"W-1.00'   | ⑭ N39°40'52"E-198.00' |
| ④ N50°19'08"W-84.00'  | ⑮ S50°19'08"E-179.41' |
| ⑤ N39°40'52"E-110.00' |                       |
| ⑥ N50°19'08"W-112.62' |                       |
| ⑦ N39°40'52"E-83.00'  |                       |
| ⑧ N12°18'56"W-58.08'  |                       |
| ⑨ N34°18'03"W-79.80'  |                       |
| ⑩ N45°53'02"W-25.21'  |                       |
| ⑪ N50°19'08"W-79.84'  |                       |

EASEMENT DATA

- ① 15.00' CITY OF SAN DIEGO STORM DRAIN ESMT. SDUPD DWG. NO. 519-025 EXIST.
- ② 15.00' CITY OF SAN DIEGO WATER ESMT. 519-034 EXIST.
- ③ 20.00' CITY OF SAN DIEGO STORM DRAIN ESMT. SDUPD DWG. NO. 519-005 EXIST.
- ④ 25.00' PUBLIC PEDESTRIAN ACCESS ESMT.
- ⑤ 30.00' CITY OF SAN DIEGO WATER ESMT. S.D.U.P.D. DWG. NO. 519-031 EXIST.
- ⑥ 30.00' CITY OF SAN DIEGO STORM DRAIN ESMT. EXIST.
- ⑦ 60.00' CITY OF SAN DIEGO GEN. UTIL. ESMT. EXIST.
- ⑧ 24.00' PUBLIC PEDESTRIAN ACCESS ESMT.
- ⑨ 35.00' PUBLIC PEDESTRIAN ACCESS ESMT.
- ⑩ CITY OF SAN DIEGO GENERAL UTILITY EASEMENT 519-030 EXIST.

DRAWN: CSK  
 CHECKED:  
 REVIEWED: *CSK*  
 APPROVED:

**SAN DIEGO UNIFIED PORT DISTRICT**  
 TIDELAND LEASE  
 WITHIN CORPORATE LIMITS OF SAN DIEGO  
 FIFTH AVENUE LANDING, LLC

DATE: 18 MAR 2010  
 SCALE: 1"=200'  
 REF: 2E-12  
 DRAWING NO.  
 SHEET 3 OF 3  
 019-064

P:\5643\SURVEY\SURVEY\PLATS\PLATS\5643-1-2-3-5th Ave.dwg



**ASSIGNMENT AND ASSUMPTION OF LEASE AGREEMENT**

This Assignment and Assumption of Lease Agreement ("Assignment") is made and effective as of December 2, 2009 by and between **FIFTH AVENUE LANDING, LLC**, a California limited liability company ("Assignor"), and **SAN DIEGO CONVENTION CENTER CORPORATION, INC.**, a California corporation ("Assignee"), with reference to the following facts:

**RECITALS**

A. Assignor has a leasehold interest for the real property described on Exhibit A attached hereto as created by that certain Lease dated October 9, 1984 executed by Lessor, San Diego Unified Port District ("District"), and Lessee, Sea Group Construction, Inc. as referenced in the document entitled "Abstract of Lease" recorded October 19, 1984, as Instrument/file No. 84-396340 of Official Records and as contained in Abstract of Lease Amendment No. 1 recorded April 24, 1989 as File No. 89-211276 of Official Records; Abstract of Lease Amendment No. 2 recorded January 16, 1990 as File No. 90-024091 of Official Records; Abstract of Lease Amendment No. 3 recorded May 1, 1991 as File No. 1991-0199572 of Official Records; Abstract of Lease Amendment No. 4 recorded September 28, 1992 as File No. 1992-0612112 of Official Records; Abstract of Lease Amendment No. 5 recorded December 9, 1993 as File No. 1993-0827938 of Official Records; Abstract of Lease Amendment No. 6 recorded September 8, 1994 as File No. 1994-0536487 of Official Records; Abstract of Lease Amendment No. 7 recorded October 6, 1995 as File No. 1995-0451279 of Official Records; Abstract of Lease Amendment No. 8 recorded January 17, 1997 as File No. 1997-0023835 of Official Records; Amendment No. 9 recorded March 17, 2000 as File No. 40018; Amendment No. 10 recorded October 7, 2003 as File No. 46577; Amendment No. 11 recorded September 11, 2006 as File No. 50952; Amendment No. 12 recorded August 22, 2007 as File No. 52299; and Amendment No. 13 recorded December 1, 2009 as File No. \_\_\_\_\_ (collectively, the "District Lease").

The parties expressly acknowledge that the interest being transferred herein from Assignor to Assignee includes only the land portion of the District Lease (as per Amendment No. 13), with Assignee retaining the water portion of the District Lease; the land portion is further described on Exhibit A-1 (the "Real Property") and the water portion is further described on Exhibit A-2.

B. Assignor desires, subject to the consent of the San Diego Unified Port District in the form attached hereto, to assign and transfer all of its right, title and interest under the District Lease to Assignee and Assignee desires to accept the assignment and to assume all of the obligations under the District Lease.

**ASSIGNOR AND ASSIGNEE HEREBY AGREE AS FOLLOWS:**

Assignor hereby assigns, transfers and sets over onto Assignee all of Assignor's right, title and interest in and to the District Lease. Assignee hereby accepts the assignment and agrees to assume any and all obligations of the Tenant under the District Lease.


By the San Diego Unified Port District's consent hereto, Assignor and its guarantors, being Raymond Allen Carpenter and Arthur E. Engel, are hereby released from all obligations under the District Lease.

**[Signatures on next page.]**

Assignor:

**FIFTH AVENUE LANDING, LLC,**  
a California limited liability company

By:

  
Arthur E. Engel, Manager

By:

Raymond A. Carpenter, Manager

Assignee:

**SAN DIEGO CONVENTION CENTER  
CORPORATION, INC.,**  
a California corporation

By:

Its

Assignor:

**FIFTH AVENUE LANDING, LLC,**  
a California limited liability company

By:

Arthur E. Engel, Manager

By:

Raymond A. Carpenter, Manager

Assignee:

**SAN DIEGO CONVENTION CENTER  
CORPORATION, INC.,**  
a California corporation

By:

Its



Assignor:

**FIFTH AVENUE LANDING, LLC,**  
a California limited liability company

By: \_\_\_\_\_  
Arthur E. Engel, Manager

By: \_\_\_\_\_  
Raymond A. Carpenter, Manager

Assignee:

**SAN DIEGO CONVENTION CENTER  
CORPORATION, INC.,**  
a California corporation

By: \_\_\_\_\_  
Its VP FINANCE

(1)

**REFERENCE COPY  
56484**

**Date:** January 13, 2012

**To:** File

**From:** Ralph M. Carpio, Document Management Assistant,  
Office of the District Clerk

**Subject:** Document No. 56484 – Assignment and Assumption of Lease  
Agreement Between Fifth-Avenue Landing, LLC and San Diego  
Convention Center Corporation, Inc.

---

**Note to File:**

Original document with wet signature is not available and Port of San Diego is not a party to the Agreement.

(2)

REFERENCE  
COPY

56484

Re Assignment and Assumption of ]  
Lease Agreement from Fifth Avenue ]  
Landing, LLC, to San Diego ]  
Convention Center Corporation ]

RESOLUTION 2010-56

WHEREAS, the Board of Port Commissioners (Board) of the San Diego Unified Port District (District) previously approved a lease, dated 9 October 1984, as assigned and amended, with Fifth Avenue Landing, LLC, as successor in interest, for the premises located bayward of Convention Way and Marina Park Way in the City of San Diego; and

WHEREAS, the Board previously certified the South Embarcadero Redevelopment Program 2 and Port Master Plan Amendment Final Environmental Impact Report, UPD No. 83356-EIR-435/SCH No. 1997051014 (Final EIR) which, among other things, analyzed the potential environmental impacts of certain land and water uses for said premises; and

WHEREAS, pursuant to Title 14, Section 15004(b)(2) of the California Code of Regulations (State CEQA Guidelines), a public agency may enter into a land acquisition agreement when the agency has conditioned the agency's future use of the site on compliance with the California Environmental Quality Act (CEQA) and the agency does not take any actions which foreclose alternatives or mitigation measures that would ordinarily be part of the CEQA review of the project; and

WHEREAS, Fifth Avenue Landing, LLC desires to assign said lease to the San Diego Convention Center Corporation, NOW, THEREFORE,

BE IT RESOLVED by the Board of Port Commissioners of the San Diego Unified Port District, as follows:

That the Assignment and Assumption of Lease Agreement document, to be placed on file in the office of the District Clerk, for premises located bayward of Convention Way and Marina Park Way in the City of San Diego, from Fifth Avenue Landing, LLC, a

California limited liability company, to San Diego Convention Center Corporation (SDCCC), covering said lease dated 9 October 1984, as assigned and amended, is hereby consented to subject to the following express conditions:

1. That all of the terms, conditions, provisions and covenants of said lease, as assigned and amended, shall remain and continue in full force and effect.
2. The assignee, SDCCC, assumes each and every obligation under said lease, as assigned and amended, and the conditions contained in this resolution.
3. No further assignment, voluntary or involuntary, by operation of law or otherwise, in whole or in part of said lease, as assigned and amended, or any interest therein, and no sublease of the whole or any part of the leased premises shall be valid or effective without the express written consent of District, first had and obtained in each instance.
4. The assignee's, SDCCC, future use of the premises for any land or water use not previously analyzed in the Final EIR is conditioned on compliance with CEQA pursuant to State CEQA Guidelines, Section 15004(b)(2).

ADOPTED this 6th day of April, 2010.

sw  
4/6/10

**SAN DIEGO UNIFIED PORT DISTRICT**REFERENCE  
COPY

56484

DATE: April 6, 2010

SUBJECT: PROPOSED HOTEL AND PHASE 3 EXPANSION OF THE SAN DIEGO CONVENTION CENTER

- A) PRESENTATION ON THE PROPOSED EXPANSION HOTEL AND PHASE 3 EXPANSION OF THE SAN DIEGO CONVENTION CENTER
- B) RESOLUTION CONSENTING TO THE ASSIGNMENT AND ASSUMPTION OF LEASE FROM FIFTH AVENUE LANDING, LLC TO THE SAN DIEGO CONVENTION CENTER CORPORATION
- C) ORDINANCE GRANTING AMENDED, RESTATED AND COMBINED LEASE TO SAN DIEGO CONVENTION CENTER CORPORATION ENDING JUNE 30, 2024
- D) RESOLUTION CONSENTING TO A \$12.5 MILLION DEED OF TRUST SECURED BY THE SAN DIEGO CONVENTION CENTER CORPORATION LEASEHOLD INTEREST IN FAVOR OF FIFTH AVENUE LANDING, LLC
- E) ORDINANCE GRANTING 20-YEAR LEASE WITH TWO FIVE YEAR OPTIONS TO EXTEND TO FIFTH AVENUE LANDING, LLC

**EXECUTIVE SUMMARY:**

The San Diego Convention Center Corporation (SDCCC) proposes to pursue entitlements to develop a hotel and phase 3 expansion of the San Diego Convention Center (Project) on District property bay ward of Convention Way and Marina Park Way. The Project would be built on District property currently leased to Fifth Avenue Landing, LLC (FAL), including a one-acre public park/plaza. The staff presentation on the proposed Project is for illustrative purposes only. Staff will return to the Board at a later date for preliminary project review and authorization to commence preparation of the Environmental Impact Report (EIR) for the Project, after conducting stakeholder outreach regarding the design of the Project and collaborating with SDCCC regarding the conceptual development plan.

SDCCC entered into an agreement to purchase FAL's leasehold interest in September 2008 and paid FAL \$1 million for a one-year due diligence process. SDCCC now desires to acquire FAL's remaining leasehold interest for \$13.5 million. FAL will finance SDCCC's acquisition by providing a \$12.5 million deed of trust secured by the leasehold interest. SDCCC will pay FAL \$1 million at the close of escrow and make annual payments of \$500,000 for up to five years. Consequently, SDCCC is requesting District consent to the assignment of a portion of the FAL leasehold interest to SDCCC, the grant of a new Amended, Restated and Combined (ARC) lease to SDCCC and consent to a lease encumbrance.

ACTION TAKEN: 04-06-2010 - Resolution 2010-56, Ordinance 2603,  
Resolution 2010-57, Ordinance 2604 and  
Resolution 2010-58

SDCCC's new ARC lease expires on June 30, 2024, with annual minimum market rent of \$376,000 and allowed uses for parking and special events. The ARC lease provides a framework for SDCCC to work with the District in a collaborative process to design and entitle the Project. If the Board certifies an EIR and the California Coastal Commission (CCC) approves a Port Master Plan Amendment (PMPA), SDCCC obtains financing for the phase 3 expansion and the City and District amend the Convention Center Management Agreement, then the Board may consider issuing a Coastal Development Permit (CDP) for the phase 3 expansion and granting a new 66-year lease to SDCCC pursuant to the terms outlined in the ARC lease. The expansion hotel site would revert to the District for future development opportunity.

If SDCCC does not satisfy the conditions in the ARC lease, FAL, as the lender, has the ability to cure any defaults and foreclose on SDCCC's leasehold interest. In the event of foreclosure, FAL will have 365 days to exercise its option imbedded in the ARC lease to develop a hotel or the leasehold will revert to the District.

The proposed new lease with FAL for the Water Transportation Center (WTC) includes a 3.5 acre water parcel and a land parcel with improvements, including: a ticket booth, parking and public restrooms. There is also an expansion option for a 4.5 acre water parcel, for a total of up to 30 slips. The WTC lease expires on February 28, 2030 with 2 five-year options to extend, for a maximum lease term of 30 years. Minimum rent is set at \$114,000 versus standard District percentage rental rates. As a condition of the lease, FAL must comply with the terms of its existing CDP issued for the WTC and complete the public promenade by September 30, 2011.

Conditioned on the Board's consent to the assignment of FAL's leasehold interest to SDCCC, grant of the ARC lease to SDCCC and consent to the SDCCC lease encumbrance, staff recommends the grant of a new 20-year lease to FAL plus 2 five-year options to extend for the WTC.

**RECOMMENDATION:**

- (A) Presentation on the Proposed Expansion hotel and Phase 3 Expansion of the San Diego Convention Center
- (B) Resolution Consenting to Assignment and Assumption of Lease From Fifth Avenue Landing, LLC to the San Diego Convention Center Corporation
- (C) Ordinance Granting Amended, Restated and Combined Lease to San Diego Convention Center Corporation ending June 30, 2024
- (D) Resolution Consenting to a \$12.5 million Deed of Trust Secured by the San Diego Convention Center Corporation Leasehold Interest in favor of Fifth Avenue Landing
- (E) Ordinance Granting 20-year Lease with Two 5-year options to extend to Fifth Avenue Landing, LLC

**FISCAL IMPACT:**

FAL currently pays the District annual minimum rent is \$469,400 versus standard District percentage rental rates. The immediate impact is that minimum rent for the two new leases will increase to \$490,000 annually versus standard District percentage rental rates. FAL will pay the District annual minimum rent of \$114,000 per year versus standard District percentage rental rates for the WTC lease and total percentage rent is estimated at \$152,000 annually. SDCCC will pay annual minimum rent of \$376,000 versus standard District percentage rental rates for the ARC lease.

If SDCCC exercises its option to enter into a new 66-year lease to develop the expansion, then SDCCC will pay standard District percentage rental rates for retail uses throughout the term of the new lease. During the initial bond term (maximum 30 years), SDCCC will pay flat market ground rent and the District will reimburse SDCCC for qualified expenses equal to the market rent due, with the net result being no rent to the District. The District would continue to receive ground rent versus standard District percentage rental rates from FAL. If the District enters into an agreement to develop the hotel, there would be future revenues to the District as well.

During the planning and entitlement phase, the District will analyze the fiscal impact as a result of development of the Project. Unreimbursed District staff and consultant costs to process the entitlements for the SDCCC Project are estimated at approximately \$500,000 to \$1,000,000 annually over a period of about three years.

If SDCCC fails to pay rent, then FAL as the lender is obligated to meet SDCCC's obligations. If FAL forecloses on SDCCC, it must develop a hotel under a new 66-year lease and pay District standard percentage rents. According to revenue projections provided by FAL for its currently entitled hotel (2008), a 250-room hotel may generate up to \$2.4 million in annual rent to the District. According to revenue projections provided by SDCCC for its proposed expansion hotel (2009), a 500-room expansion hotel could generate up to \$3.6 million a year in annual rent to the District.

**COMPASS STRATEGIC GOALS:**

If the District secures entitlements for the proposed Project and SDCCC secures the financing, then the District may benefit from an increased number of conventions and visitors on tidelands which may result in additional revenues from existing tenants.

This agenda item supports the following Strategic Goal(s).

- ☒ Promote the Port's maritime industries to stimulate regional economic vitality.
- ☒ Enhance and sustain a dynamic and diverse waterfront.
- ☒ Protect and improve the environmental conditions of San Diego Bay and the Tidelands.
- ☒ Ensure a safe and secure environment for people, property and cargo.

- ☐ Develop and maintain a high level of public understanding that builds confidence and trust in the Port.
- ☐ Develop a high-performing organization through alignment of people, process and systems.
- ☒ Strengthen the Port's financial performance.
- ☐ Not applicable.

**DISCUSSION:****Purchase and Sale Agreement Between FAL and SDCCC**

On September 16, 2008, FAL and SDCCC entered into a letter of intent to form a definitive agreement for the purchase and sale of FAL's option to lease agreement for the premises which expires on April 9, 2010. The key terms of the purchase and sale agreement, include:

- A 12-month due diligence period (complete) with payment of \$1 million to FAL;
- Project includes a hotel of at least 250-rooms and phase 3 of the convention center expansion;
- At the close of escrow on April 9, 2010, SDCCC pays FAL \$1 million and FAL accepts a promissory note from SDCCC for \$12.5 million secured by SDCCC's leasehold interest;
- SDCCC pays FAL \$500,000 annually for four years with the balance of \$10.5 million due on the fifth anniversary of the closing date; and,
- If SDCCC defaults, then FAL may foreclose on SDCCC's leasehold interest, but regardless is responsible for SDCCC's obligation under the lease and development of a hotel.

**Memorandum of Understanding (MOU)**

In November 2008, SDCCC and FAL requested the District's consent to the Purchase and Sale transaction; however, the District would not consent to the transaction agreement without an agreement for redevelopment of the property. On December 2, 2008, the District entered into an MOU with FAL and SDCCC. The MOU provides SDCCC with the time to conduct their due diligence and also allowed District and SDCCC staff time to negotiate agreements for SDCCC's proposed Project. The MOU was later amended to be coterminous with an extension of the SDCCC and FAL purchase agreement, expiring on April 9, 2010.



**Port Master Plan – Current Entitlements**

The Port Master Plan currently allows for a 250-room Spinnaker Hotel to be developed, consistent with FAL's previously approved concept plans. The current 3.4 acre site includes room for a 250-room, 276-foot high hotel, retail, surface parking, 40,000 square foot ballroom/meeting facility, in addition to a one acre public park/plaza. The Spinnaker Hotel project as entitled required the realignment of Convention Way and the ability to use 110 parking spaces in the District's Convention Center Garage. SDCCC was a stakeholder in the South Embarcadero Redevelopment Program 2 EIR and PMPA and agreed that when the hotel was developed, it would support an amendment of the Convention Center Management Agreement to codify the hotel requirements for parking, landscape maintenance and realignment of Convention Way in exchange for deleting the Convention Center's requirement to pay percentage rents under certain circumstances and obtain District approval for subleases within the Convention Center.

**Proposed Expansion Hotel and Phase 3 Convention Center Expansion**

SDCCC proposes to build approximately 950,000 square feet of phase 3 expansion is on the FAL site over the existing truck docks, Convention Way and the one acre FAL public park/plaza, plus pedestrian bridges over Harbor Drive at Fourth Avenue to connect the Convention Center to the Gaslamp Quarter and the expansion hotel. The Convention Center would include approximately 207,000 square feet of contiguous exhibit space to the existing convention center in addition to meeting, ballroom and pre-function spaces. Two pedestrian bridges would be built over the public promenade connecting the Convention Center to the expansion hotel site. The Convention Center expansion footprint will be set back 20 feet from the 35-foot wide public promenade along the waterfront. Further information about SDCCC's Project is provided in Attachment A "EXISTING CONVENTION CENTER VS. PROPOSED PHASE 3 EXPANSION."

SDCCC's proposed 250-500 room hotel would need to be functionally and operationally self sufficient on a much smaller site reduced from a 3.4 acre parcel to a less than one acre parcel (approximately 30,000 square feet). SDCCC's latest proposal for a 500 room hotel tower would be built over a 120 foot podium for a combined total of 385 feet. It would accommodate approximately 248 parking spaces on site and approximately 50,000 square feet of ballroom/meeting spaces. Further information about the former FAL Spinnaker Hotel concept as compared to the proposed SDCCC expansion hotel concept is provided in the attached ATTACHMENT B "FAL'S SPINNAKER HOTEL VS. SDCCC'S PROPOSED EXPANSION HOTEL."

SDCCC proposes to work with the District and fund all third-party consultant costs to complete the entitlement process of an EIR and PMPA for the Project. If entitlements are successfully negotiated for the proposed Project and SDCCC secures financing and

is able to exercise its expansion option, then the District would have the rights to develop the hotel on the remaining 1 acre hotel parcel that would revert to the District.

If a PMPA is not approved to entitle the proposed Project or SDCCC is unable to secure financing and exercise its expansion option, then FAL may foreclose on the SDCCC leasehold, develop the expansion hotel as entitled or exercise its hotel option to entitle a new hotel by June 30, 2016 and enter into a new lease to develop a new hotel on the entire 3.4 acre parcel.

If FAL is unable to exercise its hotel option by June 30, 2016, then the FAL leasehold will revert to the District to pursue a hotel or other development opportunities at its discretion.

**Amended, Restated and Combined Lease with SDCCC**

The proposed ARC lease with SDCCC is further described in Attachment C "AMENDED, RESTATED and COMBINED LEASE INFORMATION SUMMARY" and supplemental term sheet summaries.

The District and SDCCC have reached agreement on a transactional, environmental and Coastal Commission processing framework in the ARC lease whereby SDCCC has an option to develop the phase 3 expansion and the District would retain rights to build the expansion hotel, contingent on satisfying the following conditions:

1. Board approval of the Project, certification of a Final EIR and PMPA;
2. California Coastal Commission approval of the PMPA;
3. District issuance of a CDP for the phase 3 expansion; and,
4. Board approval of SDCCC's financing plan; and District and City of San Diego agreement to amend the Convention Center Management Agreement to provide for additional parking for the expansion hotel in the District's Convention Center Parking Garage.

Once SDCCC has satisfied these conditions, it can exercise its option to enter into a new lease to construct the phase 3 expansion. The ARC lease would terminate and the District will consider approval of a new 66-year lease for the phase 3 expansion site. The District would retain the expansion hotel site for future development, once entitled.

The proposed 66-year Convention Center expansion lease must comply with Board policies in effect at the time and SDCCC is responsible for payment of market rent for the retail spaces within the phase 3 expansion without any rental or construction offsets. In exchange for the payment of ground rent from SDCCC for the phase 3 expansion, the District will reimburse SDCCC from SDCCC's qualified expenses that benefit the tidelands, subject to applicable law and District approval. At all times, the

amount of market rent to be paid by SDCCC shall equal the qualified expenses that the District reimburses to SDCCC.

If SDCCC is unable to satisfy the conditions for exercising its option to develop the phase 3 expansion by entering into a new lease or is otherwise unable to fulfill its obligations under the ARC lease, as the lender, FAL has the ability to step in and cure any defaults or foreclose on SDCCC. In the event of foreclosure or any transfer to FAL, FAL would have 365 days to exercise a hotel option. If FAL fails to satisfy its hotel option requirements by June 30, 2016, the ARC lease will be terminated and the property will revert to the District.

#### **ARC Lease Encumbrance**

In order to close escrow by April 9, 2010, FAL has agreed to accept a promissory note from SDCCC for \$12.5 million at the rate of 6% per annum. The promissory note would encumber SDCCC's ARC leasehold interest and require that SDCCC pay FAL \$500,000 per year for up to five years or until the balance of the \$12.5 million note is due. Board consent is required for this lease encumbrance. If SDCCC discontinues its note payments, FAL could foreclose and take ownership of the SDCCC leasehold interest.

#### **New Lease with FAL for Water Transportation Center**

The proposed lease with FAL is further described in Attachment D "PROPOSED WATER TRANSPORTATION LEASE INFORMATION SUMMARY."

The proposed lease to FAL for the WTC allows for the continued operation of the facility in a direct lease with the District. The recently completed facility contains 20,000 square feet of docks and floats. Current landside improvements include partial completion of the public promenade, landside ticket booth, public restrooms and a one-acre public park/plaza. The lease also includes a provision that once the District certifies an EIR for the proposed expansion, the landside parcel would be removed and included in a new lease to SDCCC without a reduction in rent. Under the terms of the lease, FAL would remain a direct tenant of the District and all rental revenues would pass to the District without offsets.

FAL is responsible to complete the unfinished promenade (approximately 500 linear feet) by September 30, 2011 as required in its existing CDP for the WTC. When constructed, the completed promenade will complete the connection from the Hilton San Diego Bayfront Hotel, San Diego Marriott Hotel & Marina and South Embarcadero Marina Park. If SDCCC moves forward with the expansion, the promenade could be damaged but will be repaired by SDCCC. As required in the Port Master Plan, the promenade will not be closed during the construction of the proposed SDCCC project.

**Conclusion**

The informational presentation on the proposed SDCCC Project does not constitute project approval by the District. Staff will return to the Board at a later date after it has had an opportunity to obtain input from area stakeholders and revise the Project to meet the urban design parameters set forth by the Convention Center Task Force. District staff has a number of concerns regarding the design, including lack of adequate parking, additional truck traffic, loss of quality access to the expansion hotel and Embarcadero Marina Park South, and disruption of views up and down the promenade. These are concerns identified by CCC staff in earlier meetings between the District and SDCCC.

If the Board consents to assign a portion of the FAL leasehold interest to SDCCC and the lease encumbrance along with the grant of a new ARC lease, SDCCC will pay rent and use the lease area while it pursues its project entitlements and the City pursues a financing plan for the phase 3 expansion.

The benefits to the District include an independent water transportation center operated by FAL on the adjacent parcels, completion of a public promenade and the hotel development requirement in the ARC lease. In return, the District will commit staff and resources to support the entitlement process to develop a phase 3 expansion of the convention center that may provide a net benefit for District stakeholders and the San Diego region.

Approval of the ARC lease to SDCCC means that the District and SDCCC must next mutually agree on the conceptual design of the Project. If the Board approves the staff recommendations, staff will begin a series of stakeholder outreach and design workshops with SDCCC to consider the potential adverse impacts of the programmatic design elements of the proposed Project on the urban design, environment and viable access to the future expansion hotel and Embarcadero Marina Park South.

Once SDCCC and the District mutually agree on the design of the proposed Project, staff will return to the Board for Preliminary Project Review and authority to start the environmental review process by executing a three-party consulting agreement to draft the EIR and the PMPA. Staff will also commission an economic analysis at SDCCC's cost of the incremental costs versus benefits of the proposed phase 3 expansion to District stakeholders and return to the Board with a recommendation prior to completion of the EIR and PMPA.

**Port Attorney's Comments:**

The Port Attorney has reviewed and approved the requested documents for form and legality.

**Environmental Review:**

This proposed Board action is not subject to CEQA, as amended.

**Equal Opportunity Program:**

Not applicable.

**PREPARED BY:**    Shahriar Afshar  
                             Senior Asset Manager, Real Estate  
  
                             Penny Maus  
                             Asset Manager, Real Estate.

<b>Attachment A</b> <b>Existing Convention Center and Proposed Phase 3 Expansion</b>		
	<b>Existing Convention Center</b>	<b>Proposed Phase 3 Expansion (additional space)</b>
Gross Space	1,772,457 square feet	Approx. 950,000 square feet
Exhibition Space	615,000 square feet	Approx. 198,000 square feet
Outdoor Terrace Space	261,433 square feet	Approx. 58,000 square feet
Meeting Space	205,000 square feet	Approx. 88,000 square feet
Ballroom Space	80,000 square feet	Approx. 80,000 square feet
Retail Space	None	Approx. 49,400 square feet
Truck Docks	50 truck docks	17 new truck docks
Parking Spaces	1,849 total public spaces in District garage (1,200 allotted for convention center; 80 for City; 600 for San Diego Marriott)	None
Building Height	140 feet	154 feet (5 floors)
Road Work	Harbor Drive lowered	Reduction and realignment of Convention Way to a 30-foot wide 2-lane covered roadway
Pedestrian Bridge	None	1 over Harbor Drive

<b>Attachment B</b> <b>FAL's Spinnaker Hotel and SDCCC's Proposed Expansion Hotel</b>		
	<b>FAL's Spinnaker Hotel (per Port Master Plan)</b>	<b>SDCCC's Proposed Expansion Hotel</b>
Number of Rooms	250 rooms	500 rooms
Number of Floors	21 floors	33 floors
Building Height	276 feet (21 floors)	385 feet (23 floors – guest rooms over 120 foot, 9-level podium)
Gross Square Feet	Approx. 200,000 square feet	Approx. 609,518 square feet (includes garage/ podium)
Parking	88 surface parking <u>+110 spaces at District garage</u> 198 total spaces	248 spaces (4-level garage under hotel) <u>+110 spaces at District garage</u> 358 total spaces
Retail/Restaurant	Approx. 13,500 square feet	Approx. 54,500 square feet (spa, restaurant & rooftop bar)
Meeting Space	Approx. 25,000 square feet	Approx. 19,000 square feet
Ballroom Space	Approx. 25,000 square feet	Approx. 19,000 square feet
Truck Docks	1	2
Road Work: Convention Way	Realign & reduce width to 30 feet	Realign & reduce width to 30 feet (under proposed phase 3 expansion building)
Public Park/Plaza	1-acre mitigation FAL public park/plaza	Phase 3 expansion built over 1-acre FAL mitigation public park/plaza and ½ acre of Harbor Drive park
Pedestrian Bridge(s)	1 over Convention Way	2 over Convention Way

**Attachment C**  
**Proposed Amended, Restated and Combined Lease Summary**

<b>Lessee:</b>	San Diego Convention Center Corporation, a non-profit public benefit corporation
<b>Location:</b>	Convention Way and Marina Park Way San Diego, CA
<b>Area:</b>	191, 623 square feet tideland area
<b>Use:</b>	Public park/plaza, public parking, meetings, exhibitions, trade shows and special events.
<b>Term:</b>	July 1, 1984 – June 30, 2024
<b>Rent:</b>	Minimum \$376,000/year versus standard Board-adopted rates
<b>Rent Reviews:</b>	5-Year CPI Adjustments 10-Year Rent Reviews
<b>Guaranty:</b>	Term of lease guaranteed by Raymond Carpenter, Arthur Engel, Herbert Engel, and David Engel
<b>Redevelopment &amp; Development Options:</b>	See attached "Proposed Expansion Lease Term Sheet Information Summary" and attached "Hotel Lease Term Sheet Information Summary"



**PROPOSED EXPANSION LEASE**  
**TERM SHEET INFORMATION SUMMARY**

**Conditions Precedent:** The grant of a lease, under the terms of this term sheet, is conditioned on the satisfactory completion of the conditions precedent as referenced in paragraph 49(h) of the Amended/Restated/Combined lease between the District and Lessee.

**Parties:** San Diego Unified Port District ("District") and San Diego Convention Center Corporation ("SDCCC") or the City of San Diego as Permitted Assignee ("LESSEE").

**Premises:** Approximately 6 acres of tidelands, located bay ward of the convention center between Marina Park Way and Park Boulevard.

**Project:** Development of approximately 950,000 square feet of San Diego Convention Center Phase III expansion including approximately 49,400 square feet of ground level retail along the public promenade; and two pedestrian bridges over Convention Way between the hotel and the expansion; a third pedestrian bridge over Harbor Drive; Relocation and realignment of portions of Convention Way; and creation of a traffic circle at Convention Way and Marina Park Way.

**Lease Uses:** The Premises shall be used solely and exclusively for convention center uses and retail uses and for no other purposes whatsoever.

**Lease Term:** Sixty-six (66) years.

**Minimum Rent:** Lessee will pay minimum vs. percentage rent for all retail uses on the Premises.

First Term (Est. 30 years): Lessee shall pay annual minimum rent during the initial amortization period of the bond(s) with a written itemization of Qualified Expenses that total an amount equal or greater than the rent payment. "Qualified Expenses" will mean normal and customary expenses incurred by SDCCC and approved by Lessor, consistent with applicable law, that directly benefit the Tidelands.

Second Term (Est. 36 years): With respect to the balance of the Premises Lessee will pay rent based on a preliminary

- determination of initial annual rent by Lessor that will consider a market rate appraisal, the status of SDCCC as a non-profit public benefit corporation operating at a loss, potential increases in percentage rents that Lessor may receive from nearby businesses on the surrounding tidelands properties, administrative and other costs Lessor incurs in connection with this Lease.
- Percentage Rent:** Lessee shall pay standard Board-adopted percentage rental rates with no offsets except that all revenues from convention center operations will be excluded.
- Expansion Construction:** Lessee will be solely responsible for all soft-hard costs, pre-development and other costs for Expansion construction, which shall be commenced and completed in an amount of time fixed by the Lease. SDCCC shall not seek any rental or construction cost offsets from the District.
- CPI Adjustments:** Rents shall have mid-term CPI adjustments every five (5) years during the Second Term.
- Rent Reviews:** Rent reviews shall be every 10 years during the Second Term.
- Hotel Requirements:** The Expansion Lease will provide that the Expansion Hotel will have access to the Convention Center's meeting rooms and banquet facilities in reasonable proximity to the Expansion Hotel at rates and other terms equal to those granted by Lessee to other hotel operators.
- Incorporation of WTC Parcel No. 1:** On the date that the Board of Port Commissioners approves the Expansion Lease, Parcel No. 1 of the Fifth Avenue Landing, LLC lease will be incorporated into the new Expansion Lease.
- District Policies:** Lessee shall comply with all District policies in effect at the time of granting the Lease.
- Retail Merchandising Plan:** As part of Lessee's application for a CDP for the Expansion, Lessee will deliver to Lessor a merchandising plan for all retail uses proposed for the Premises.

**PROPOSED HOTEL LEASE TERM SHEET**  
**INFORMATION SUMMARY**

**Conditions Precedent:** The grant of a lease, under the terms of this term sheet, is conditioned on the satisfactory completion of the conditions precedent as referenced in paragraph 50(h) of the Amended/Restated/Combined lease between the District and Lessee.

**Parties:** San Diego Unified Port District ("District") and Lessee under Amended/Restated/Combined Lease with the District ("Lessee").

**Premises:** Approximately one acre of tidelands located bay ward of the convention center between Marina Park Way and Park Boulevard as depicted in Exhibit H, Sheet 2.

**Project:** The Hotel will consist of a minimum of 250 rooms in a tower which is a minimum of twenty (20) stories tall (the lobby counting as one-story) with banquet and conference rooms, ballroom, restaurants, cocktail lounges, retail shops, and related development on the Premises including parking in accordance with District's published standards, a public park/plaza of approximately one acre, public promenade along the waterfront, pedestrian bridge, and a public observation terrace, and an interface with the existing water transportation center. The Hotel will meet or exceed the service quality standards of a four diamond, AAA standard.

**Lease Uses:** The Premises shall be used solely and exclusively for hotel uses and for no other purposes whatsoever. This restriction on use of the Premises absolutely prohibits a change in use.

**Lease Term:** Sixty-six years.

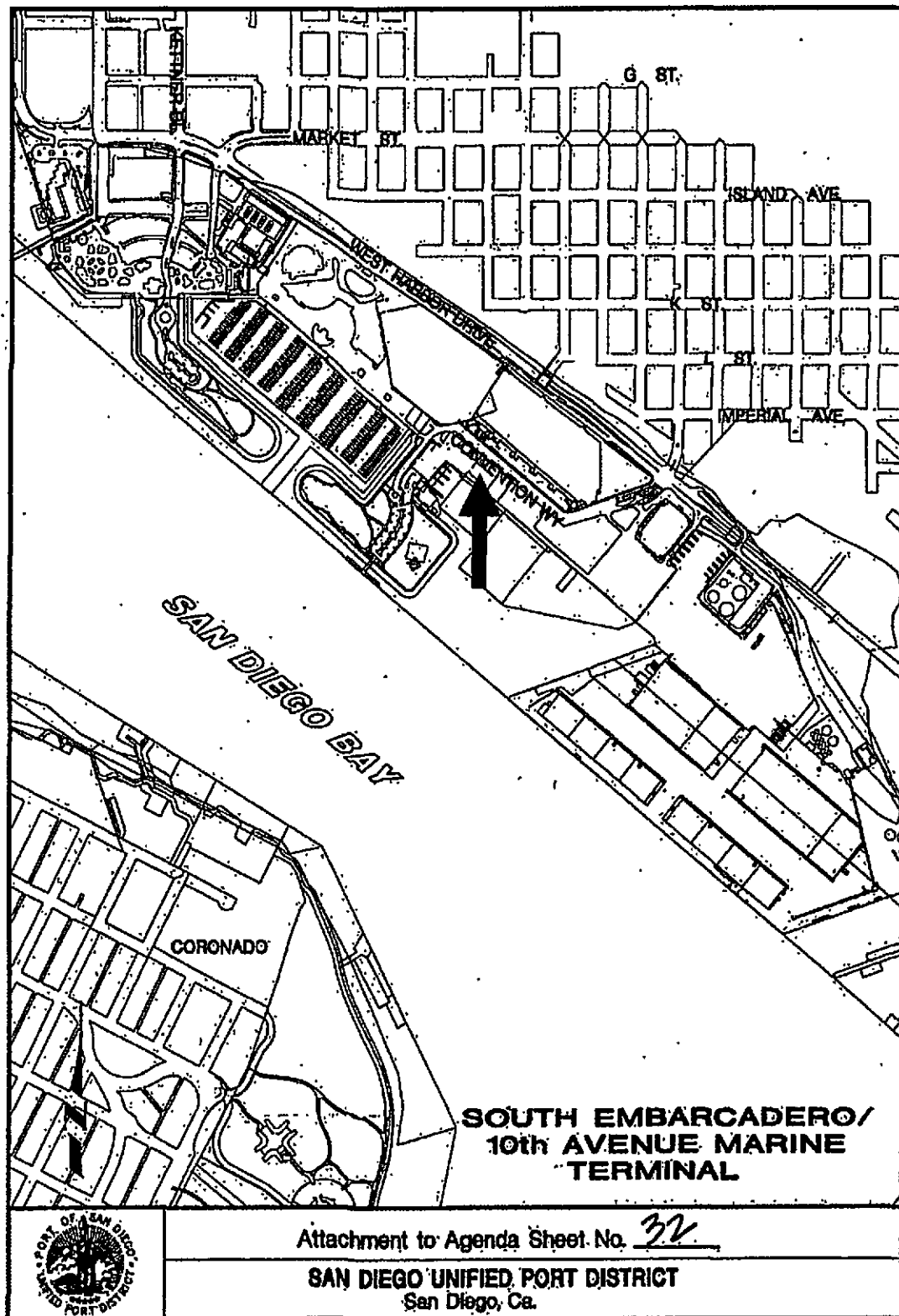
**Minimum Rent:** Lessee shall pay annual minimum rent to be determined by a market rate appraisal at the time the District grants the Lease OR not less than Seventy-Five Percent (75%) of the proforma total percentage rents to be verified by an independent feasibility study with no offsets.

**Percentage Rent:** Lessee shall pay standard Board-adopted percentage rental rates with no offsets.

- Construction:** Lessee will be solely responsible for all soft-hard costs, pre-development and construction costs, for all private improvements on the Premises, which shall be completed in an amount of time fixed by the Lease. Lessee shall not seek any rental or construction cost offsets from the District.
- CPI Adjustments:** Rents shall have mid-term CPI adjustments every 5 years.
- Rent Reviews:** Rent reviews shall be every 10 years.

**Attachment D**  
**Proposed Water Transportation Center Lease Summary**

<b>Lessee:</b>	Fifth Avenue Landing, LLC
<b>Location:</b>	Convention Way and Marina Park Way San Diego, CA
<b>Area:</b>	25,598 square feet tideland area 156,260 square feet water area
<b>Use:</b>	(i) water transportation center for conducting harbor excursions, dinner cruises, whale-watching, ferry service, boat charters and water taxi operations; (ii) picking up and dropping off of passengers by water transportation operators; (iii) transient oriented berthing facilities that will accommodate between 20 and 30 large yachts; and, (iv) parking.
<b>Term:</b>	Twenty Years with Two Options to Extend of Five Years Each (for a total maximum term of thirty years)
<b>Rent:</b>	Minimum \$114,000/year versus standard Board-adopted rates
<b>Rent Reviews:</b>	5-Year CPI Adjustments 10-Year Rent Reviews
<b>Guaranty:</b>	Term of lease guaranteed by Raymond Carpenter, Arthur Engel, Herbert Engel, and David Engel
<b>Water Option Parcel:</b>	After District obtains Closure Letter rescinding Campbell Clean-Up and Abatement Order, Lessee will have 24-month option to lease additional 207,600 feet of water area. Option cannot be exercised until Lessee has obtained all development approvals and permits.



**SAN DIEGO UNIFIED PORT DISTRICT**

**DATE:** April 6, 2010

**SUBJECT: RESOLUTION ADOPTING PLANS AND SPECIFICATIONS AND  
AWARDING CONTRACT NO. 2009-28 TO NEWEST CONSTRUCTION  
COMPANY, INC. FOR B STREET PIER AND BROADWAY PIER COLD  
IRONING PROJECT IN THE AMOUNT OF \$1,764,216**

**EXECUTIVE SUMMARY:**

As outlined in previous memoranda to the Board, the accelerated implementation of the project to provide shore power to the B Street and Broadway Pier cruise ship berths requires six (6) separate agreements. This accelerated implementation was a requirement of the Carl Moyer Grant that is partially funding this project. Board action to date has authorized all but the final agreement. The work associated with all the approved agreements is proceeding on schedule for completion in December 2010, as required. This recommended Board action is to approve the final agreement and authorize NEWest Construction Company, Inc. (NEWest) to provide infrastructure improvements to transmit power from a shore based electrical supply to berthed ships on the B Street and Broadway Piers.

The construction contract was advertised on January 28, 2010. Construction bids were opened on March 1, 2010. Four (4) bidders responded with bids ranging from \$1,764,216 to \$ 2,817,700. The lowest responsive bid was received from NEWest in the amount of \$1,764,216. The Engineer's construction cost estimate was \$1,800,000.

**RECOMMENDATION:**

Resolution adopting plans and specifications and awarding contract No. 2009-28 to NEWest Construction Company, Inc. for the B Street Pier and Broadway Pier Cold Ironing Project, San Diego, California in the amount of \$1,764,216.

**FISCAL IMPACT:**

Funds for the B Street Pier and Broadway Piers Cold Ironing project are identified in the FY 2009 – 2013 Capital Development Program (CDP). To fund this project, \$4,500,000 has been budgeted in the CDP. Another \$2,400,000 is available through the Carl Moyer Grant if the project is operational by January 1, 2011.

**COMPASS STRATEGIC GOALS:**

This project allows cruise ships to reduce emissions while docked at berth, enhancing and sustaining a dynamic waterfront, improving district and regional environmental conditions and ensuring a safer environment for people, property and cargo.

<b>ACTION TAKEN: 04-06-2010 - Resolution 2010-58</b>
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- ☒ Promote the Port's maritime industries to stimulate regional economic vitality.
- ☒ Enhance and sustain a dynamic and diverse waterfront.
- ☐ Protect and improve the environmental conditions of San Diego Bay and the Tidelands.
- ☒ Ensure a safe and secure environment for people, property and cargo.
- ☒ Develop and maintain a high level of public understanding that builds confidence and trust in the Port.
- ☐ Develop a high-performing organization through alignment of people, process and systems.
- ☐ Strengthen the Port's financial performance.
- ☐ Not applicable.

**DISCUSSION:**

Based upon previous authorization from the Board, staff continues to implement the Cruise Ship Terminal (CST) Shore Power Project at the B Street and Broadway Piers. Staff originally identified six (6) major agreements necessary to expedite and complete the CST Shore Power Project. Each of the six (6) agreements included a separate cost estimate and required Board approval. When totaled, it was estimated that this project would cost \$6.9 million. For clarity, all six (6) agreements, along with original cost estimates and variances, are listed in the table below:

<b>SHORE POWER AGREEMENT ESTIMATE AND COST SUMMARY</b>			
<b>Agreement</b>	<b>Estimate</b>	<b>Actual</b>	<b>Variance</b>
(1) Design Coordination w/ Cochran	\$150,000	\$152,000	(\$2,000)
(2) Consulting Services - Shore Power Infrastructure Design w/ EPI	\$250,000	\$252,000	(\$2,000)
(3) Equipment Purchase from Cochran	\$2,600,000	\$2,633,897	(\$33,897)
(4) Construction Coordination by Cochran - included in (3) above	\$200,000	\$0	\$200,000
(5) Construction Contract (per this agenda)	\$1,800,000	\$1,764,216	\$35,784
Construction Contingency (8%)	\$0	\$133,626	(\$133,626)
(6) SDG&E Infrastructure Upgrades	\$1,900,000	\$1,964,261	(\$64,261)
Subtotal	\$6,900,000	\$6,900,000	\$0

The Board has authorized all but one of these agreements. The final agreement to allow implementation of this project is the subject of this agenda. Staff recommends award of the construction contract listed as item No. five (5) in the amount of \$1,764,216. Once executed, the total cost of all agreements is \$6,766,374. An 8% construction contingency (\$133,626) is included in the table above, bringing the total cost estimate of the project to \$6.9 million.



For this final component of the project, construction plans and specifications were advertised beginning January 28, 2010. Bids were opened on March 1, 2010. A total of four (4) construction bids were received ranging from \$1,764,216 to \$2,817,700 as listed in the following table:

<b>Company</b>	<b>Bid Amount</b>	<b>Location</b>
NEWest Construction Co., Inc.	\$1,764,216	San Diego
3D Enterprise Inc	\$2,126,000	San Diego
Chula Vista Electric Co.	\$2,536,164	Chula Vista
Marathon Construction Corporation	\$2,817,700	Lakeside

The lowest responsive bid was received by NEWest Construction Company, Inc., in the amount of \$1,764,216. The Engineer's construction cost estimate for this work was \$1,800,000.

In conclusion, Staff recommends that the Board approve the Resolution adopting plans and specifications and awarding Contract No. 2009-28, to NEWest Construction Company, Inc. for the B Street Pier and Broadway Pier Cold Ironing Project, San Diego, California in the amount of \$1,764,216.

**Port Attorney's Comments:**

The Port Attorney has reviewed and approved the requested document for form and legality.

**Environmental Review:**

A Coastal Development Permit (Permit No CDP-2010-001, Document No. 52970) was issued for the subject project in January 2010 per Board resolution 2010-08 in accordance with the requirements of CEQA.

**Equal Opportunity Program:**

Due to limited sub participation opportunities, no SBE goal was established for this opportunity.

**PREPARED BY:** Yeshi Mulugeta  
Capital Project Manager, Engineering/Construction

**SAN DIEGO UNIFIED PORT DISTRICT**

**DATE:** April 6, 2010

**SUBJECT: DISCUSSION OF POSSIBLE LEGISLATION OF INTEREST TO THE  
SAN DIEGO UNIFIED PORT DISTRICT, STATUS REPORT AND  
DIRECTION TO STAFF IF ANY**

**EXECUTIVE SUMMARY:**

Update on Senate Bill 1039, by Senator Denise Moreno Ducheny. This bill would authorize the Port to provide "unspecified" revenues from Port-operated marine terminals to member cities in which the marine terminals are located – National City and San Diego.

A joint meeting to discuss this bill has been scheduled for March 26, 2010, with Senator Ducheny, the City of National City, the City of San Diego and Port staff.

Other recently-introduced bills of interest to the Port will be discussed.

**RECOMMENDATION:**

Continue to oppose Senate Bill 1039 due to the possible long-term financial detriment to the Port's ability to fund infrastructure and projects along state tidelands and on behalf of the state of California.

**FISCAL IMPACT:**

The fiscal impact of Senate Bill 1039 has not yet been determined. Senate Bill 1039 is not specific to the percentage of or total of maritime revenue.

**COMPASS STRATEGIC GOALS:**

This agenda item supports the following Strategic Goal(s).

- ☒ Promote the Port's maritime industries to stimulate regional economic vitality.
- ☒ Enhance and sustain a dynamic and diverse waterfront.
- ☒ Protect and improve the environmental conditions of San Diego Bay and the Tidelands.
- ☒ Ensure a safe and secure environment for people, property and cargo.
- ☒ Develop and maintain a high level of public understanding that builds confidence and trust in the Port.
- ☐ Develop a high-performing organization through alignment of people, process and systems.
- ☒ Strengthen the Port's financial performance.
- ☐ Not applicable.

**ACTION TAKEN: 04-06-2010 - Board voted to oppose Senate Bill 1039 and directed staff to form Maritime Enhancement Advisory Committee.**

**DISCUSSION:**

Staff will provide an update about the joint meeting held on Friday, March 26, 2010.

**Port Attorney's Comments:**

The Port Attorney will continue to monitor and analyze the proposed bill in coordination with staff.

**Environmental Review:**

This proposed Board action is not subject to CEQA, as amended.

**Equal Opportunity Program:**

Not applicable.

**PREPARED BY:** Irene McCormack  
Assistant Vice President  
Government Relations and Communications

**SAN DIEGO UNIFIED PORT DISTRICT**

**DATE:** April 6, 2010

**SUBJECT: RESOLUTION AUTHORIZING LETTER OF INTEREST TO SUPPORT  
LOUIS VUITTON TROPHY – AMERICA'S CUP EVENTS ON SAN  
DIEGO BAY**

**EXECUTIVE SUMMARY:**

Staff recommends that the Board authorize issuance of a Letter of Interest indicating the enthusiasm and capability of the San Diego region to take the lead in location sponsorship for the Louis Vuitton Trophy and supporting the America's Cup sailing races. San Diego can provide many levels of support including land and water event venues, sponsorships, and team base camp sites on San Diego Bay.

A Letter of Interest is the first step needed for the World Sailing Teams Association SA (WSTA), who organizes the America's Cup, to consider San Diego as a potential location for an event such as the Louis Vuitton Trophy. Identification of potential sites for team base camps such as the Oracle/BMW team camp at Fifth Avenue Landing in 2008/2009, potential venues for the Louis Vuitton Trophy, and the numerous maritime visitor support services would be included in the Letter of Interest. If the WSTA selects San Diego, the next step would be to negotiate a Memorandum of Understanding to partner with the WSTA regarding production of an event.

**RECOMMENDATION:**

Adopt a Resolution authorizing a Letter of Interest to support the Louis Vuitton Trophy – America's Cup Events on San Diego Bay.

**FISCAL IMPACT:**

There is no fiscal impact associated with the Letter of Interest.

**COMPASS STRATEGIC GOALS:**

A Letter of Interest supporting the Louis Vuitton Cup – America's Cup Events on San Diego Bay supports a dynamic and diverse waterfront, would bring numerous economic benefits to the regional economy.

This agenda item supports the following Strategic Goal(s).

-  Promote the Port's maritime industries to stimulate regional economic vitality.
-  Enhance and sustain a dynamic and diverse waterfront.

**ACTION TAKEN: 04-06-2010 - Resolution 2010-59**

- ☒ Protect and improve the environmental conditions of San Diego Bay and the Tidelands.
- ☒ Ensure a safe and secure environment for people, property and cargo.
- ☒ Develop and maintain a high level of public understanding that builds confidence and trust in the Port.
- ☒ Develop a high-performing organization through alignment of people, process and systems.
- ☒ Strengthen the Port's financial performance.
- ☒ Not applicable.

**DISCUSSION:**

The Port Tenant's Association is working closely with the District and many interested stakeholders to explore the potential of sponsorship with the WSTA for the Louis Vuitton Trophy – America's Cup Races. Meetings have been held with civic leaders, member cities and port tenants including the yacht clubs. Since San Francisco's Golden Gate Yacht Club is the official owner of the Cup and likely location for the America's Cup races, San Diego's support of America's Cup teams and events could have a very positive economic impact for the State of California.

San Diego has historically supported sailing and the America's Cup, and is a world-class venue for sailing events. Besides great weather for sailing, San Diego offers a wide range of services and activities that are needed to stage a successful event such as the Louis Vuitton Trophy and team base camp sites; many host accommodations in close proximity to downtown and waterside venues; and substantial facilities to support mega yachts which are likely to come to events along the Pacific coast.

Staff recommends that the Board authorize issuance of a Letter of Interest indicating the capability of the San Diego region to take the lead in supporting the America's Cup sailing races.

**Port Attorney's Comments:**

The Port Attorney has reviewed and approved the requested document for form and legality.

**Environmental Review:**

This proposed Board action is not subject to CEQA, as amended.

**Equal Opportunity Program:**

Not Applicable

**PREPARED BY:** Karen J. Weymann  
Director, Real Estate

**SAN DIEGO UNIFIED PORT DISTRICT**

**DATE:** April 6, 2010

**SUBJECT: RESOLUTION SELECTING AND AUTHORIZING THREE-YEAR MARKETING AND ADVERTISING SERVICE AGREEMENT, WITH TWO ONE YEAR OPTIONS, AND AUTHORIZE FUNDING IN AN AMOUNT NOT TO EXCEED \$550,000 FOR FY10-11 WITH MJE MARKETING SERVICES, INC.**

**EXECUTIVE SUMMARY:**

The San Diego Unified Port District issued a request for proposals (RFP) seeking advertising and marketing services for a three-year period with provisions that funding is subject to approval of the Board of Port Commissioners annually. Sixteen proposals were received and reviewed by Port staff. Five firms were selected for interviews based on the criteria outlined in the RFP.

Five applicants were interviewed by a review panel consisting of Port staff and key stakeholders. The review panel evaluated each applicant on experience of proposed staff, approach to the project, capability to perform, cost and price and firm's relevant experience and media purchasing volume. The review team is recommending the Board select MJE Marketing Services, Inc. (MJE) to continue as the Port's agency of record to perform requested services in support of the Port's strategic plan and marketing programs.

**RECOMMENDATION:**

Resolution selecting and authorizing three-year marketing and advertising service agreement, with two one-year options, and authorize funding in an amount not to exceed \$550,000 for FY10-11 with MJE Marketing Services, Inc.

**FISCAL IMPACT:**

Funds are included in the Marketing Department's proposed FY 10/11 operating budget, Professional Services Account. Approval of this agenda item will commit funds for this line item of the proposed budget. The preliminary FY 10/11 budget will be presented to the Board on April 29, 2010.

**COMPASS STRATEGIC GOALS:**

Entering into this agreement will facilitate the following:

1. Drive business and incremental revenue to the Port's visitor serving businesses

**ACTION TAKEN: 04-06-2010 - Resolution 2010-60**

2. Assist in stimulating of the regional economy in the cruise and maritime sectors
3. Increase public understanding of the Port and its operation

This agenda item supports the following Strategic Goal(s).

- ☒ Promote the Port's maritime industries to stimulate regional economic vitality.
- ☒ Enhance and sustain a dynamic and diverse waterfront.
- ☒ Protect and improve the environmental conditions of San Diego Bay and the Tidelands.
- ☐ Ensure a safe and secure environment for people, property and cargo.
- ☒ Develop and maintain a high level of public understanding that builds confidence and trust in the Port.
- ☒ Develop a high-performing organization through alignment of people, process and systems.
- ☒ Strengthen the Port's financial performance.
- ☒ Not applicable.

#### **DISCUSSION:**

Five applicants were interviewed by a review panel consisting of the following: Commissioner Stephen P. Cushman, Sharon Cloward, Executive Director, San Diego Port Tenants and Port staff representing Communications, Procurement Services, Marketing and Contracts. The companies interviewed were MJE Marketing Services, Inc, Mentus Marketing & Advertising, Pacific Municipal Consultants, Greenhaus and Advanced Marketing Strategies. The group participated in a facilitated process to determine the company with the most appropriate skills to meet the Port of San Diego's RFP requirements.

The five companies were rated on a point system with one being the highest rank per vote. MJE Marketing, Inc. ranked 6, thus the review team is recommending MJE Marketing, Inc. for Board approval due to the comprehensive program of work. The lowest scores thus the highest ranking went to:

MJE Marketing, Inc. earned 6 points (low is favorable in this vote) and Mentus Marketing & Advertising earned 10 points. MJE Marketing, Inc. presented an excellent package demonstrating depth of experience in working with public agencies including prior work at the Port of San Diego, San Diego Regional Economic Development Corporation and numerous travel and tourism related establishments. Additionally, MJE has partnered with Initiative Media to maximize the Port's media buy opportunities. MJE offered the most complete package and capability to assist the District in achieving the goals established in the Port's strategic plan.

**Mentus Marketing & Advertising:** Mentus ranked second and brought a highly experienced, well-rounded and capable staff that conveyed a logical approach to serving the Port's needs. Mentus did not demonstrate the media buying power required for the most competitive cost and price available for Port projects. Mentus did not display the expected attention to detail in their written work and proposal.

MJE Marketing, Inc. agreed to a retainer that covers a set fee to include MJE staff time, production costs, creative development, strategic planning media purchase and other services as outlined in the contract to be fiscally responsible in the current contracted economy. MJE is utilizing Initiative Media to place the Port's broadcast media buys at a low negotiated rate due to bulk with no mark up to the Port of San Diego.

<b>Firm</b>	<b>Rankings</b>	<b>Score</b>
MJE Marketing Services	1,1,1,2,1	6
Mentus Marketing & Advertising	2,3,2,1,2	10
Pacific Municipal Consultants	3,5,5,5,3	21
Greenhaus	4,2,3,3,5	17
Advanced Marketing Strategies	5,4,4,4,4	21

The advertising and marketing services agency funds will be used for program development to achieve goals as outlined in the Port's strategic plan. The Marketing and advertising services performed under this agreement are integrated with the communications and public relations efforts of the Port in a comprehensive effort to assist the Port in achieving its strategic goals to create and sustain a vibrant waterfront (Big Bay, Cruise, Maritime, Working Waterfront initiatives) environmental stewardship (Green Port initiative) and community service (Public Art, Community Outreach, Maritime Education, and overall corporate advertising and promotion). These services are not available in house nor is there capacity of staff to carry out these responsibilities.

<b>Activity Description</b>	<b>Amount</b>
Media purchases in support of tenant programs i.e. Big Bay, Maritime Education, Cruise, Environmental, Public Art, Public Outreach, Corporate and strategic planning initiatives, real estate and maritime and other initiatives as directed by Port staff and Marketing and Public Relations Committee – 60%	\$330,000.00
Monthly set fee to cover MJE staff time, Production costs, Creative development, Strategic planning, Development of overall campaigns and Marketing programs, Copywriting, Administration, implementation, weekly status meetings, production, media analysis and research, tenant presentations and meetings, and website development for bigbay.com and sandiegocruiseport.com – 40% of total	\$220,000.00
<b>Total</b>	<b>\$550,000.00</b>



**Port Attorney's Comments:**

The Port Attorney has reviewed and approved the requested document for form and legality.

**Environmental Review:**

This proposed Board action is not subject to CEQA, as amended.

**Equal Opportunity Program:**

The recommended firm, MJE Marketing Services, Inc., a certified Small Business Enterprise, identified one small business sub-consultant.

**PREPARED BY:** Jackie Williams  
Manager of Marketing



D



## **PROMISSORY NOTE**

\$12,500,000.00

San Diego, California

May 6, 2010

**FOR VALUE RECEIVED, SAN DIEGO CONVENTION CENTER CORPORATION, INC.**, a California corporation ("Maker"), promises to pay to **FIFTH AVENUE LANDING, LLC**, a California limited liability company, or order ("Payee"), at 1311 First Avenue, Coronado, California 92118, or at such other place(s) as Payee may designate from time to time in writing, the principal sum of Twelve Million Five Hundred Thousand Dollars (\$12,500,000.00), together with interest on the unpaid principal balance at the rate of five and twenty-seven hundredths percent (5.27%) per annum (365 days) from the date of this Promissory Note until the principal is paid in full.

Payments of principal and interest shall be made as provided below in the paragraph entitled "PAYMENT OF PRINCIPAL AND INTEREST."

### **PAYMENT OF PRINCIPAL AND INTEREST**

Commencing on the date one (1) year following the date of this Promissory Note, and continuing on that same date each year thereafter, Maker shall pay to Payee payments of Five Hundred Thousand Dollars (\$500,000.00), which will be applied first to accrued but unpaid interest and then to principal. This payment will continue until the first to occur of the following events, at which time the unpaid principal balance, and all accrued but unpaid interest, shall be due and payable: (1) The date five (5) years after the date of this Promissory Note; (2) upon Maker obtaining the funding of its financing in connection with the Expansion Option as described in the Lease that is security for this Promissory Note; (3) upon termination of the Expansion Option for any reason as described in the Lease that is security for this Promissory Note; or (4) upon notice in writing from Maker that it elects to abandon its project for the Expansion as described in the Lease, and to terminate the Expansion Option.

In the event any payment is not received by Payee within five (5) days following its due date, a late charge equal to three percent (3%) of the payment shall be due from Maker to Payee in addition to the payment that is otherwise due. Maker acknowledges that this late charge is intended to reimburse Payee for administrative expenses incurred by Payee due to Maker's failure to make timely payments.

### **PREPAYMENT PRIVILEGE**

Principal and/or interest may be prepaid in whole or in part at any time without penalty or premium.

### **SECURITY**

This Promissory Note is secured by a Deed of Trust with Assignment of Rents of even date herewith (the "Deed of Trust") covering Maker's leasehold interest set forth in that certain Amended, Restated and Combined Lease with the San Diego Unified Port District (the "Lease") for that certain real property located at 600 Convention Way, San Diego, CA 92101 (the "Property"). Payee acknowledges that Maker's obligations under this Promissory Note are non-recourse.

### ACCELERATION

In the event that Maker shall default in the payment of installment when due, or in the payment of any late charge incurred in connection with a late installment payment, or is otherwise in default of the Lease or the Deed of Trust and has not cured same within any applicable cure period, the whole sum of the principal balance, and all accrued interest thereon, shall become immediately due and payable at the option of Payee without notice to Maker.

**DUE ON SALE:** Should Maker sell, convey, transfer, assign, further encumber, or alienate the Property, or any part thereof, or any interest therein, or agree to do so, or be divested of Maker's title or any interest therein in any manner or way, whether voluntarily or involuntarily, without the written consent of Payee, Payee may declare the whole sum of the principal balance, and all accrued interest thereon, immediately due and payable at the option of Payee without notice to Maker. Consent to one such transaction shall not be deemed to be a waiver of the right to require such consent to future or successive transactions.

### ATTORNEYS' FEES

If Payee refers this Promissory Note or the Deed of Trust securing this Promissory Note to an attorney for collection or seeks legal advice following a default under this Promissory Note or the Deed of Trust securing this Promissory Note; or if an action is instituted on this Promissory Note or the Deed of Trust securing this Promissory Note; or if any other judicial or non-judicial action is instituted by Payee or any other person in connection with this Promissory Note or the Deed of Trust securing this Promissory Note, and an attorney is employed by Payee to appear in any such action or proceeding to reclaim, sequester, protect, preserve, or enforce Payee's interest, including, but not limited to, proceedings to foreclose on this Promissory Note and/or the Deed of Trust securing this Promissory Note, proceedings under the Federal Bankruptcy Code, proceedings in connection with any state or federal tax lien, or proceedings to enforce an assignment of rents or for the appointment of a receiver, then Maker, and every person who assumes the obligations evidenced by this Promissory Note and/or who assumes or takes subject to the Deed of Trust securing this Promissory Note, jointly and severally, promise to pay reasonable attorneys' fees for services performed by Payee's attorney, and all costs and expenses incurred incident to employment.

### MISCELLANEOUS

Principal and interest are payable in lawful money of the United States. Time is of the essence in the performance of Maker's obligations under this Promissory Note.

Maker:

**SAN DIEGO CONVENTION CENTER  
CORPORATION, INC.,**  
a California corporation

By:

  
Its President & CEO

E

## **AGREEMENT REGARDING ASSIGNMENT IN LIEU OF FORECLOSURE**

THIS AGREEMENT REGARDING ASSIGNMENT IN LIEU OF FORECLOSURE ("Agreement") is entered into on June 19, 2015 ("Effective Date"), by and between San Diego Convention Center Corporation, Inc. ("Borrower" or "Assignor"), a California nonprofit public benefit corporation whose address is 111 West Harbor Drive, San Diego, California 92101, and Fifth Avenue Landing, LLC ("Lender" or "Assignee"), a California limited liability company whose address is 1311 First Street, Coronado, California 92118. Borrower and Lender are sometimes referred to in this Agreement collectively as the "Parties" and individually as a "Party."

### **RECITALS**

A. On or about May 6, 2010, Lender made a loan to Borrower ("Loan") in connection with an Assignment and Assumption of Lease Agreement ("2010 Assignment"), which transferred Lender's interest, as lessee, in a lease agreement with the San Diego Unified Port District ("Port"), as lessor, for the real property commonly known as 600 Convention Center Way, San Diego, California ("Property"). The lease agreement was originally dated as of October 9, 1984, but was subsequently assigned, amended, and restated numerous times. In connection with the 2010 Assignment, the Port and Borrower entered into an Amended, Restated and Combined Lease for the Property dated April 6, 2010 ("Lease").

B. As evidence of the Loan, Borrower executed a Promissory Note dated May 6, 2010 ("Note"), in the principal amount of \$12,500,000.00, in favor of Lender.

C. The Note is secured by a Deed of Trust and Assignment of Rents dated May 6, 2010 ("Deed of Trust") on Borrower's interest in the Property under the Lease. The Deed of Trust was recorded in the Official Records of San Diego County on May 7, 2010, as Instrument No. 2010-0230907.

D. All principal and unpaid interest under the Note was due and payable in one lump sum payment on or before May 6, 2015 ("Maturity Date"). Borrower is in default under the Note because Borrower has failed to pay any portion of the outstanding balance of the Loan as of the Effective Date.

E. In order to avoid financial hardship and damage to reputation to Borrower, Borrower has agreed to resolve Borrower's default by the assignment of Borrower's interest in the Lease and the Property to Lender (or Lender's designee), in lieu of foreclosure under the Deed of Trust.

F. The Parties have anticipated the transfer of the Lease interest upon default under the Loan as provided in Section 9(h) of the Lease without the prior consent of the Port provided Lender agrees in writing to assume each and every obligation under the Lease.

G. Lender desires to accept the assignment of Borrower's interest in the Lease and the Property pursuant to this Agreement to avoid the necessity of litigation, foreclosure, and the delays associated therewith, and Lender acknowledges that the provisions of this Agreement directly benefit Lender in this regard.

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H. This Agreement shall secure the terms and obligation of the Parties as provided by the ASSIGNMENT OF LEASEHOLD INTEREST IN LIEU OF FORECLOSURE, ("Assignment in Lieu") to be recorded in the Official Records of San Diego County, California immediately upon full execution of this Agreement.

NOW, THEREFORE, for and in consideration of the foregoing premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree as follows:

## TERMS AND CONDITIONS

### 1. Recitals.

1.1 Incorporation of Recitals. The above recitals are incorporated as material terms of this Agreement.

### 2. Transfer of Property.

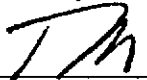

2.1 Assigned Property. Subject to the terms, provisions, conditions, covenants, and agreements herein contained, at execution of this Agreement Borrower agrees to, and hereby does, assign, transfer, and convey to Lender, or an entity designated by Lender, and Lender agrees to acquire from Borrower, absolutely and free of any right of redemption or other right or interest of Borrower or anyone claiming by, through, or under Borrower subject to a title report as mutually agreed upon by the Parties, the following real and personal property (collectively, the "Assigned Property"):

(a) *Assignment in Lieu:* All of Borrower's right, title, and interest in and to the Lease and the Property, and all easements, rights, tenements, and appurtenances thereunto belonging or appertaining to the Property, which shall be evidenced by Borrower's execution and delivery of the Assignment in Lieu attached to this Agreement as Exhibit "1" and incorporated by this reference. The date of such execution and delivery shall be the "Closing Date."

(b) *Assignment of Licenses:* All of Borrower's right, title, and interest in and to all of the following specified contracts, leases, subleases, licenses, and other agreements to use or occupy all or any part of the Property (each a "License," and collectively, the "Licenses"), together with (i) all rents and other sums due, accrued, or to become due under each such Licenses, (ii) all rents and other sums due that are received and allocable to periods after the Maturity Date, (iii) all guarantees by third parties of the tenants' obligations under any such License, (iv) any and all security deposits under the Licenses (including both cash and non-cash items given as security deposits), together with all interest thereon, subject, however, to the rights of tenants therein, if any, and (v) all claims against tenants under the Licenses or against the guarantors thereof:

(i) License No. 1505110: Padres, L.P. – Padres/Concert Boneyard;

(ii) License No. 1506086: Hartmann Studios Incorporated – Cisco Live 2015 – CDW "Bus Stop";

   
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- (iii) License No. 1506011: Cisco Systems, Inc. – Cisco Systems/Cisco Live 2015;
- (iv) License No. 1507004: San Diego Comic-Con, Inc. – San Diego Comic Con 2015;
- (v) License No. 1507081: Hadley Media, Inc. – Adult Swim Footprint - Hadley Media ICW/Comic Con; and
- (vi) License No. 1509095: San Diego Fireman's Relief Association – San Diego 9/11 Memorial Stair Climb - 2015.
- (vii) License No. 15-2191-R: AT&T Cell on Wheels – Comic-Con 2015.
- (viii) License No. 14-2100-R: Verizon Wireless Telecommunications Facility Temporary Site License.



The Licenses are transferred, conveyed, assigned, and set over unto Assignee subject to the terms of this Agreement. Assignee hereby agrees and covenants to honor and abide by all of the terms and obligations of the Licenses occurring after the Closing Date. In connection with this assignment, on the Closing Date, Assignor shall make a payment to Assignee of \$66,775.00 for the rents collected and paid in connection with the Licenses.

(c) *Agent/Management of License:* The Parties agree and understand that the San Diego Comic-Con event is a large and complex event which requires certain logistical expertise. Assignor has the required experience to manage the Comic-Con event and Assignee agrees to allow Assignor to act as its agent under License No 1507004 and 1507081 for the term of said Licenses (collectively the "Managed Licenses"). Assignor shall provide all required rents and other sums due that are received and allocable to periods after the Maturity Date pursuant to Section 2.1(b), however, Assignor shall remain the primary contact and shall act as Assignee's agent for the Managed Licenses.

(d) *General Assignment:* All other tangible and intangible personal property, equipment, and supplies located at or used in connection with the leasing, management, use, or operation of the Property including, but not limited to:

(i) All of Assignor's right, title, and interest in and to any service, supply, and maintenance contracts and equipment leases related to the Property (collectively, the "Assigned Contracts"), including, without limitation, the right to sue any obligor thereto for any breach of any covenant, agreement, representation, warranty, or guarantee contained therein, if and to the extent assignable.

(ii) All of Assignor's right, title, and interest in and to any licenses, permits, certificates of occupancy, and franchises issued by any federal, state, county, or other governmental authority relating to the use, maintenance, or operation of the Property, running to, or in favor of Assignor or the Property (collectively, the "Licenses and Permits").

   
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(iii) All of Assignor's right, title, and interest in and to any tangible and intangible personal property, equipment, and supplies located at or used in connection with the leasing, management, use, or operation of the Property including, but not limited to, lists of prospective tenants, advertising material, and assignable utility contracts (together, the "Personal Property").

2.2 Rejected Licenses. The Licenses do not include and the Parties do not agree to an assignment or transfer of any contracts, leases, subleases, licenses, and other agreements to use or occupy all or any part of the Property not specified in Section 2.1(a) above, including the following specified agreements, (each a "Rejected License" and collectively, the "Rejected Licenses"):

- (a) License No. 1506083: San Diego Symphony Orchestra Association – San Diego Symphony 2015 Summer Pops Parking; and
- (b) License No. 1509068: Competitor Group, Inc. – TriRock Triathlon Series San Diego 2015.


Assignor covenants and agrees to terminate the Rejected Licenses and to refund any deposits or monies in connection with same, if applicable. Assignee covenants and agrees to negotiate in good faith with the licensee parties under the Rejected Licenses in order to pursue mutually satisfactory agreements with respect to the matters in the Rejected Licenses.

### 3. Special Provisions of Lease.

3.1 The Parties have anticipated the transfer of the Lease upon default of the Loan pursuant to Section 9(h) of the Lease without the prior consent of the Port. The terms and conditions of the assignment due to a deed in lieu of foreclosure require that Lender assume the Lease obligations as provided in Section 9(h)(3) of the Lease:

*Assume Lease Obligations. Before FIFTH AVENUE LANDING, LLC acquires the leasehold interest, by way of foreclosure, deed-in-lieu of foreclosure, or any other form of transfer of assignment involving FIFTH AVENUE LANDING, LLC taking possession or control of the Premises it shall, as an express condition precedent, provided that FIFTH AVENUE LANDING, LLC is a tenant in good standing under Lessor's current leasing policy, agree in writing to assume each and every obligation under the Lease. Furthermore, before FIFTH AVENUE LANDING, LLC, may subsequently assign or sublease all or any portion of the leasehold interest, it shall, in each instance, obtain Lessor's prior written consent. As a further consideration to any such transfer of the Lease to FIFTH AVENUE LANDING, LLC, Lessor may require, in its sole and absolute discretion, that the individual principals of FIFTH AVENUE LANDING, LLC execute a personal guaranty of all Lease obligations hereunder.*

3.2 This Agreement and the Assignment in Lieu are made pursuant to the terms of Section 9(h) of the Lease.

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4. **Consideration.**

4.1 **Release.** In consideration for Borrower's transfer of the Assigned Property to Lender, or an entity designated by Lender, and subject to the terms, provisions, and conditions herein, Lender covenants and agrees not to bring any legal action or pursue any other available remedies against Borrower under the Note and the Deed of Trust arising out of Borrower's delinquency and indebtedness as of the Effective Date.

5. **Representations and Warranties.**

5.1 **Representations and Warranties of Lender.** Lender represents and warrants to Borrower as follows:

(a) Lender is a duly formed, organized, and validly existing limited liability company in good standing under the laws of the State of California. Lender has the right, power, and authority to execute this Agreement and to perform its obligations under this Agreement. The execution and delivery of this Agreement by Lender and the performance by Lender under this Agreement has been authorized by all necessary action of Lender.

(b) Lender represents and warrants, to its actual knowledge without duty of inquiry, it qualifies as a tenant in good standing under the current leasing policy of the Port, and agrees and covenants to assume each and every obligation under the Lease

5.2 **Representations and Warranties of Borrower.** Borrower represents and warrants to Lender as follows:

(a) Borrower is a duly formed, organized, and validly existing corporation in good standing under the laws of the State of California. Borrower has the capacity, right, power, and authority to execute this Agreement and to perform its obligations hereunder and to consummate the transaction described herein contemplated by this Agreement, including the execution and delivery of all documentation required by this Agreement. The execution, delivery, and performance of this Agreement by Borrower does not breach, conflict with, or contravene: (i) the provisions of Borrower's articles of incorporation or bylaws; (ii) any agreement, instrument, document, or indenture to which Borrower is a party or by which Borrower is bound; (iii) any applicable law; or (iv) any judgment, writ, or order directed to Borrower by which Borrower may be bound.

(b) Borrower has not filed a petition in any case, action, or proceeding under the Bankruptcy Code or any similar state law; no petition in any case, action, or proceeding under the Bankruptcy Code or any similar state law has been filed against Borrower that has not been dismissed or vacated; and Borrower has not filed an answer or otherwise admitted in writing insolvency or inability to pay debts or made an assignment for the benefit of creditors or consented to an appointment of a receiver or trustee of all or a material part of their property. The transaction contemplated herein is not a preference, voidable transfer, fraudulent conveyance, or otherwise in violation of the Bankruptcy Code or any other similar state or federal law.

(c) There are no unpaid bills or invoices for labor, services, or work performed upon the Property or within the improvements thereon, or for materials or supplies furnished or delivered to, or in connection with the Assigned Property, that could result in the filing of mechanic's, materialmen's, or laborer's liens on the Assigned Property.

(d) The Assigned Property is in compliance with all applicable governmental laws and Borrower has not received notice and does not have knowledge that the Assigned Property does not comply therewith.

(e) Borrower has not received any notice of, and has no knowledge of, any pending condemnation proceeding or conveyance in lieu thereof, or threatened rezoning, of the Property or any portion thereof.

(f) Borrower has valid leasehold title to the Property and has good title to the other components of the Assigned Property and there are no existing liens, encumbrances, agreements, encroachments, overlaps, special assessments, claims, leases, tenancies, other adverse interests, or defects upon or affecting the Assigned Property. Upon the assignment of the Lease to Lender, or an entity designated by Lender, Lender will acquire and have a good, marketable, and indefeasible leasehold interest in the Property.

(g) No authorization or approval of any governmental authority is required to be obtained by Borrower in connection with its execution, delivery, and performance of this Agreement or the other Borrower Documents.

**6. No Merger.**

6.1 Merger. Notwithstanding Lender's acquisition of the Property, the Deed of Trust shall not be cancelled, shall survive the execution of this Agreement and delivery of any assignments or releases, and shall remain in full force and effect after the transaction contemplated by this Agreement has been consummated. The Parties further agree that the interest of Lender in the Property after Lender's acquisition of the Property shall not merge with the interest of Lender in the Property under the Deed of Trust. It is the express intention of each of the Parties hereto (and all of the conveyances provided for in this Agreement shall so recite) that such interests of Lender in the Property shall not merge, but be and remain at all times separate and distinct, notwithstanding any union of said interest in Lender at any time by purchase, termination, or otherwise and that the lien of the Deed of Trust in the Property shall be and remains at all times a valid and continuous lien on the Property until and unless released of record by Lender or its successors and assigns.

**7. Miscellaneous.**

7.1 Entire Agreement. This Agreement, the exhibits attached hereto, and all other instruments and documents executed and delivered at execution of this Agreement by either Party hereto, embody the entire agreement between the Parties in connection with the transaction contemplated hereby and there are no oral or parol agreements, representations, or inducements existing between the Parties relating to the transaction contemplated hereby that are not expressly set forth herein and covered hereby. This Agreement may not be modified except in writing signed by all of the Parties.

  
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7.2 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties and the respective parents, subsidiaries, administrators, representatives, successors, and assigns.

7.3 Waivers. No waiver by any Party at any time of any breach of any provision of this Agreement shall be deemed a waiver of a breach of any other provision herein or a consent to any subsequent breach of the same or any other provision. If any action by any Party shall require the consent or approval of another Party, such consent or approval of such action on any one occasion shall not be deemed a consent to or approval of such action on any subsequent occasion or a consent to or approval of any other action on the same or any subsequent occasion.

7.4 Time Is Of Essence. The Parties agree that time is of the essence in this transaction.


7.5 Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of California.


7.6 Lender's Liability. Except to the extent expressly provided in the Borrower Documents, Lender is not assuming any obligations or liabilities of Borrower.

7.7 Survival. The terms and provisions of this Agreement shall survive the execution and delivery of the documents to be delivered to Lender pursuant to this Agreement.

7.8 Execution in Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

[SIGNATURE PAGE TO FOLLOW]

  
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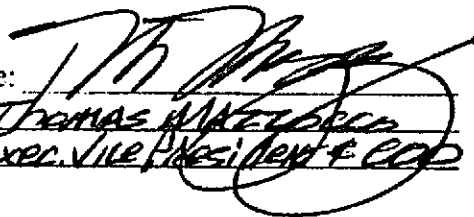
IN WITNESS WHEREOF, and intending to be legally bound hereby, the Parties hereto have executed this Agreement as of the day and year first above written.

BORROWER:

SAN DIEGO CONVENTION CENTER  
CORPORATION, INC.,  
a California nonprofit public benefit  
corporation

LENDER:

FIFTH AVENUE LANDING, LLC,  
a California limited liability company

Signature: 

Name: Thomas M. Metzger

Title: Exec. Vice President & CEO

Signature: 

Name: R.A. Carpenter

Title: Partner

# CALIFORNIA ALL PURPOSE ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA )

COUNTY OF San Diego

On 6-22-15 before me, Joan S Rose Notary Public,

Date

(here insert name and title of the officer)

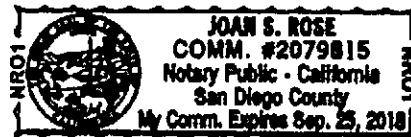
personally appeared R.A. Carpenter

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: Joan S Rose (Seal)



OPTIONAL

Description of Attached Document

Title or Type of Document: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Document Date: \_\_\_\_\_ Other: \_\_\_\_\_

RECORDING REQUESTED BY AND  
WHEN RECORDED MAIL TO:

David S. Demian, Esq.  
Finch, Thornton & Baird, LLP  
4747 Executive Drive, Suite 700  
San Diego, California 92121-3107

MAIL TAX STATEMENTS TO:

Fifth Avenue Landing, LLC  
Attn: Arthur E. Engel  
1311 First Avenue  
Coronado, California 92118

*Space above this line for Recorder's use*

**ASSIGNMENT OF LEASEHOLD INTEREST IN LIEU OF FORECLOSURE**

APN: 760-017-38, 39

The undersigned Assignor declares:

Assignee [X] was / [ ] was not the foreclosing Beneficiary

Amount of unpaid principal debt: \$ 12,500,000.00

Amount paid by the Assignee: \$ 0

DOCUMENTARY TRANSFER TAX: \$ 0 (Rev. & T. Code, § 11926.)

[ ] Unincorporated area; [X] City of San Diego

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, **SAN DIEGO CONVENTION CENTER CORPORATION, INC.** ("Assignor"), a California nonprofit public benefit corporation, hereby unconditionally and irrevocably transfers, assigns, and conveys to **FIFTH AVENUE LANDING, LLC** ("Assignee"), a California limited liability company, all of Assignor's right, title, and interest under that certain Amended, Restated, and Combined Lease dated April 6, 2010 ("Lease"), by and between San Diego Unified Port District, as lessor, and Assignor, as lessee, as evidenced by a Memorandum of Lease recorded on May 7, 2010 in the Official Records of San Diego County, California as Instrument No. 2010-0230906, for the following real property located in the City of San Diego, County of San Diego, State of California, described as:

**SEE LEGAL DESCRIPTION ATTACHED HERETO  
AS EXHIBIT "A" AND INCORPORATED BY THIS REFERENCE**

This Assignment is an absolute conveyance, Assignor having transferred said real property to Assignee for a fair and adequate consideration, such consideration being: (a) a covenant not to bring legal action arising out of Assignor's delinquency and indebtedness of \$12,500,000.00, plus interest, fees, and costs, as secured by that certain Deed of Trust with Assignment of Rents (Leasehold Interest) dated May 6, 2010, executed by Assignor, as trustor, for the benefit of Assignee, as beneficiary, recorded on May 7, 2010 in the Official Records of San Diego County, California as Instrument No. 2010-0230907 ("Deed of Trust"); and (b) other valuable consideration.

This Assignment is made pursuant to the terms and obligations of Section 9(h) of the Lease (Special Provisions Regarding SDCCC Deed of Trust) as a specific transfer of rights under subsection (2)(a). Furthermore, as

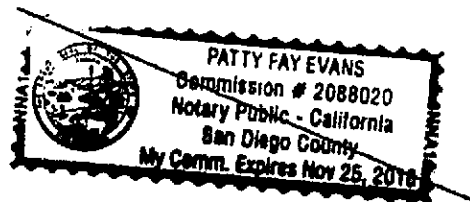
Assignor declares that this conveyance is freely and fairly made. It is the express purpose and intent of Assignor and Assignee that the interests of Assignee hereunder shall not merge with Assignee's interests under the Deed of Trust, but shall be and remain at all times separate and distinct, notwithstanding any union of said interest in Assignee, and that the lien of the Deed of Trust in the Property shall be and remain at all times a valid and continuous lien on said real property until and unless released of record by Assignee or its successors and assigns.

Dated: 6/18/15

By: Thomas P. Keefe  
Name: THOMAS P. KEEFE  
Title: Exec. Vice President + COO

[illegible]

Patty Lewis  
Notary Public





**EXHIBIT "A"**  
**LEGAL DESCRIPTION**

**EXHIBIT "A"**

**Lease Description for  
SAN DIEGO CONVENTION CENTER CORPORATION  
TIDELAND LEASE  
Parcel / Drawing No 019-063  
Within Corporate Limits of San Diego**

All that certain portion of land conveyed to the San Diego Unified Port District by that certain Act of Legislature of the State of California pursuant to Chapter 67, Statutes of 1962, First Extraordinary Session, as amended, and delineated on that certain Miscellaneous Map No. 564, filed in the Office of the San Diego County Recorder on May 28, 1976, File No. 76-164686, in the City of San Diego, County of San Diego, State of California, and more particularly described as follows:

**PARCEL NO. 1 (Land Area)**

Commencing at a 3" diameter brass disk monument stamped S.D.U.P.D. No. 14, as shown on R.O.S. No. 16668, filed in the Office of the County Recorder of San Diego County July 25, 2000; thence leaving said monument South 39°31'53" East a distance of 74.59 feet (calculated) to the TRUE POINT OF BEGINNING of Parcel No. 1, said point also being the beginning of a non-tangent 556.00 foot radius curve, concave to the north, a radial to said point bears South 00°22'28" East from the center of said curve; thence easterly along the arc of said curve through a central angle of 04°42'58" an arc distance of 45.77 feet to a point of reverse curvature, the common radial of which bears South 05°05'26" East from the center of said curve; thence southeasterly along the arc of a 32.00 foot radius curve concave to the southwest through a central angle of 44°46'18" an arc distance of 25.00 feet to a point on the southwesterly face of curb of a street commonly known as Convention Way; thence along said face of curb line South 50°19'08" East a distance of 427.86 feet to a point hereinafter known as Point "A"; thence leaving said face of curb line South 39°40'52" West a distance of 83.00 feet; thence South 50°19'08" East a distance of 112.62 feet; thence South 39°40'52" West a distance of 110.00 feet to a point on the U.S. Bulkhead Line as said U.S. Bulkhead Line is now established for the Bay of San Diego and delineated on map entitled "Harbor Lines, San Diego Bay, California File No. (D.O. series) 426" approved by the Secretary of the Army, April 29, 1963, and filed in the Office of the District Engineer, Los Angeles, California; thence leaving said U.S. Bulkhead Line and continuing South 39°40'52" West a distance of 1.00 foot; thence parallel with said U.S. Bulkhead Line North 50°19'08" West a distance of 297.61 feet; thence South 39°40'52" West a distance of 1.00 foot; thence parallel with said U.S. Bulkhead Line North 50°19'08" West a distance of 179.41 feet; thence South 39°40'52" West a distance of 198.00 feet; thence North 50°19'08" West a distance of 177.32 feet to a point on the southeasterly face of curb line of a street commonly known as Marina Park Way; thence along said face of curb line North 39°40'52" East a distance of 200.00 feet to a point on said U.S. Bulkhead Line; thence leaving said U.S. Bulkhead Line and continuing along said face of curb North 39°40'52" East a distance of 28.85 feet to the beginning of a 162.00 foot radius curve, concave to

the southeast; thence northeasterly along the arc of said curve through a central angle of 49°56'40" an arc distance of 141.21 feet to the TRUE POINT OF BEGINNING of Parcel No. 1, containing 147,642 square feet or 3.39 acres of tidelands area.

**PARCEL NO. 2 (Land Area)**

Commencing at the above described Point "A"; thence continuing along said Convention Way face of curb South 50°19'08" East a distance of 196.62 feet to the TRUE POINT OF BEGINNING of Parcel No. 2; thence continuing along said face of curb South 50°19'08" East a distance of 235.00 feet; thence leaving said face of curb South 39°40'52" West a distance of 193.00 feet to the above mentioned U.S. Bulkhead Line; thence leaving said U.S. Bulkhead Line and continuing South 39°40'52" West a distance of 1.00 feet; thence parallel with said U.S. Bulkhead Line North 50°19'08" West a distance of 235.00 feet; thence North 39°40'52" East a distance of 1.00 feet to said U.S. Bulkhead Line; thence leaving said U.S. Bulkhead Line and continuing North 39°40'52" East a distance of 193.00 feet to the TRUE POINT OF BEGINNING of Parcel No. 2, containing 45,590 square feet or 1.05 acres of tidelands area.

ALSO: Reserving therefrom a City of San Diego Water easement 15.00 feet in width lying within Parcel No. 1 as delineated and described as Easement No. 2 on sheets 2 and 4 of Drawing 019-063.

ALSO: Reserving therefrom a City of San Diego Storm Drain easement 20.00 feet in width lying within Parcel No. 1 as delineated and described as Easement No. 3 on sheets 2 and 4 of Drawing 019-063.

ALSO: Reserving therefrom an easement for Public Pedestrian Access 25.00 feet in width lying within Parcel No.'s 1 and 2 as delineated and described as Easement No. 4: on sheets 2 and 4 of Drawing 019-063.

ALSO: Reserving therefrom a City of San Diego Water easement 30.00 feet in width as shown On City of San Diego Dwg. No. 11558-35-D and lying within Parcel No.'s 1 and 2 as delineated and described as Easement No. 5 on sheets 2 and 4 of Drawing 019-063.

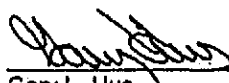
ALSO: Reserving therefrom a City of San Diego Storm Drain easement 30.00 feet in width lying within Parcel No. 1 as delineated and described as Easement No. 6 on sheets 2 and 4 of Drawing 019-063.

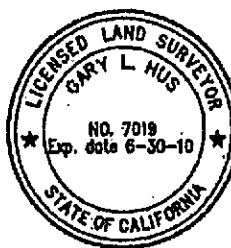
ALSO: Reserving therefrom an easement for Public Pedestrian Access 24.00 feet in width lying within Parcel No. 2 as delineated and described as Easement No. 8 on sheets 2 and 4 of Drawing 019-063.

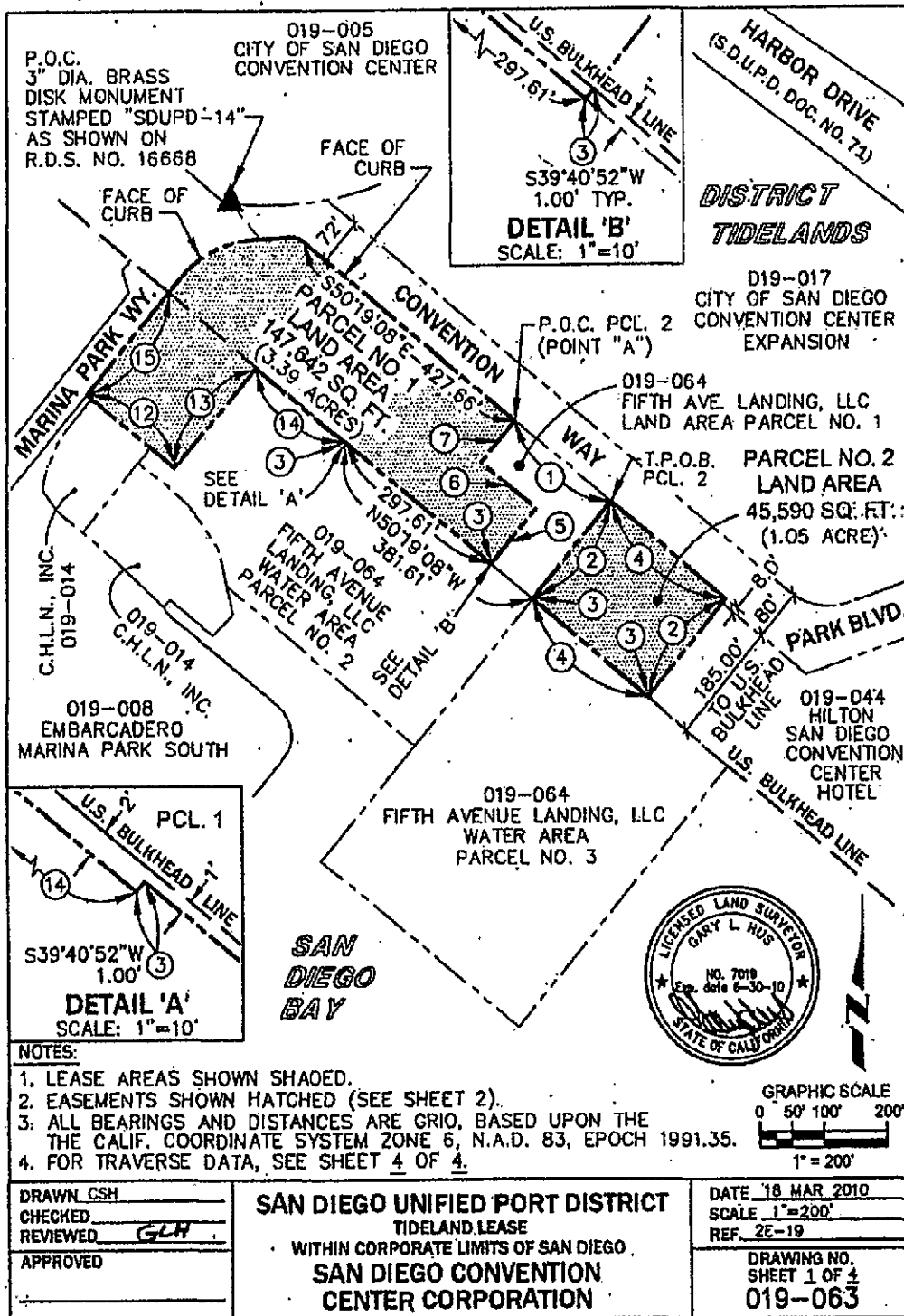
ALSO: Reserving therefrom a Public Pedestrian Access easement 35.00 feet in width lying within Parcel No.'s 1 and 2 as delineated and described as Easement No. 9 on sheets 2 and 4 of Drawing 019-063.

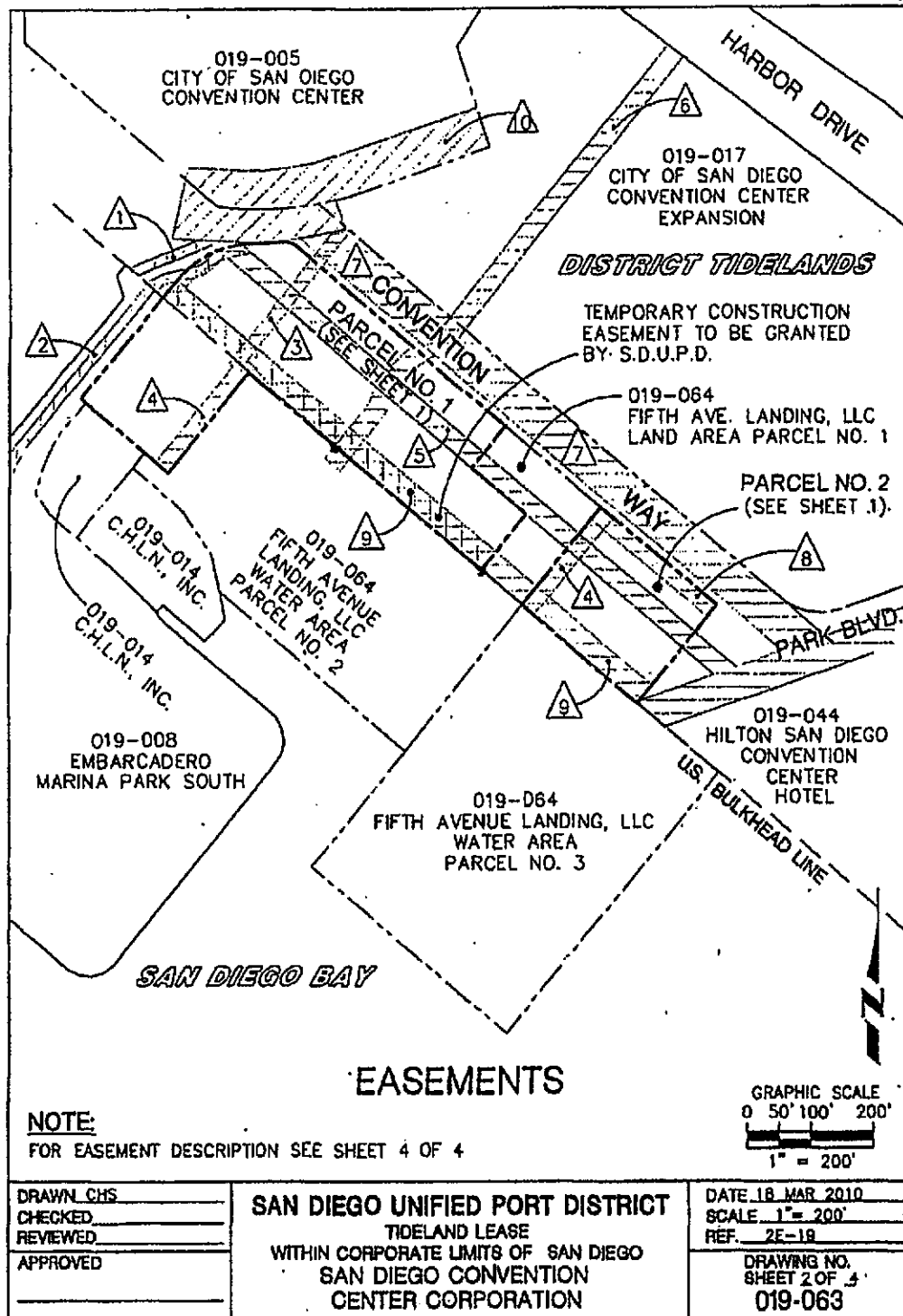
The above described tidelands lease and reservation areas are those delineated on San Diego Unified Port District Drawing No. 019-063 dated 18 March 2010, and made a part of this agreement.

All bearings and distances in the above legal description are grid, and based upon the California Coordinate System, Zone 6, N.A.D. 83, Epoch 1991.35.

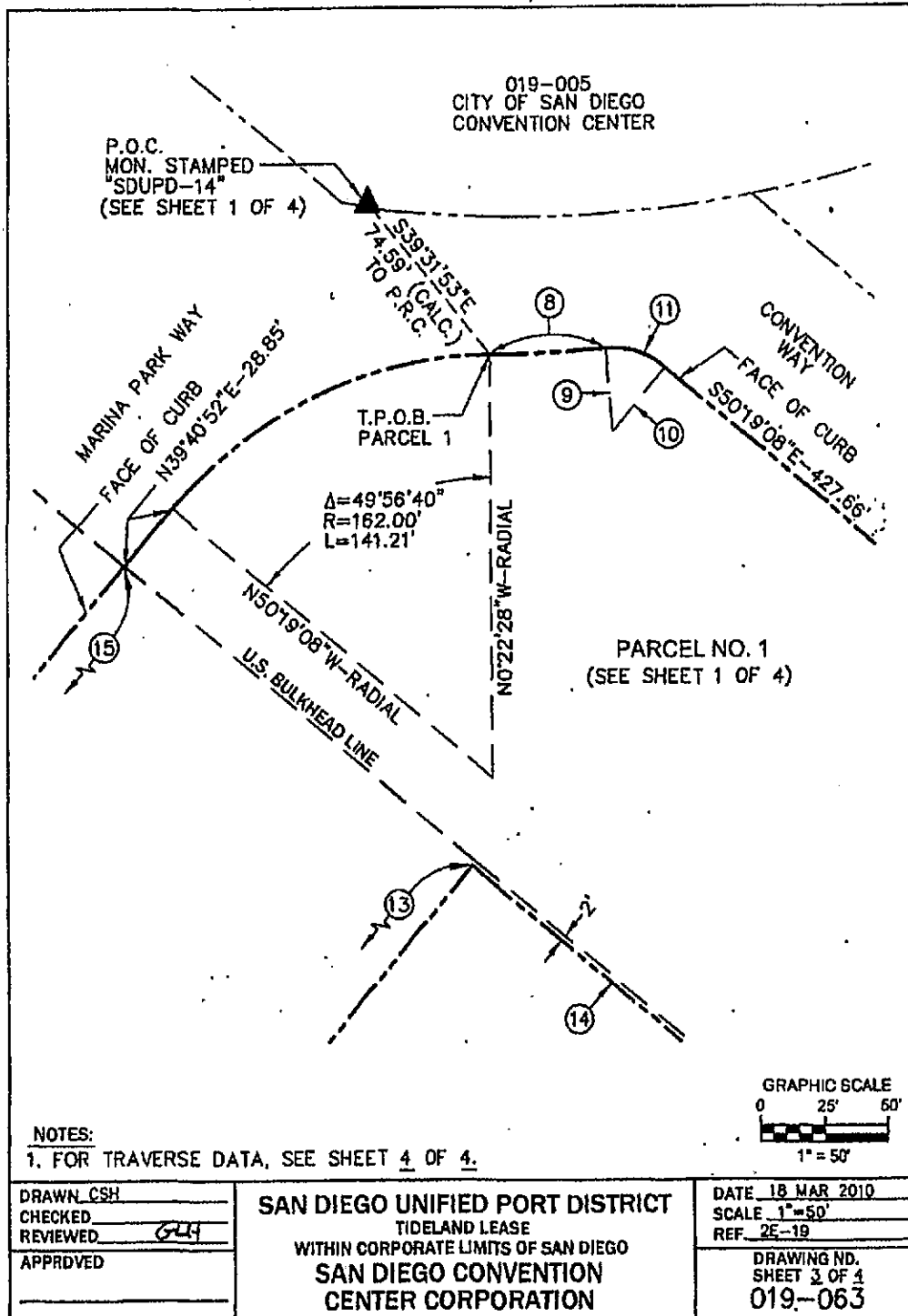
 3-18-2010  
Gary L. Hus Date  
L.S. 7019







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### TRAVERSE DATA

- |                       |                       |
|-----------------------|-----------------------|
| ① S50°19'08"E-196.62' | ⑪ Δ=44°46'18"         |
| ② S39°40'52"W-193.00' | R=32.00'              |
| ③ S39°40'52"W-1.00'   | L=25.00'              |
| ④ S50°19'08"E-235.00' | ⑫ N50°19'08"W-177.32' |
| ⑤ S39°40'52"W-110.00' | ⑬ S39°40'52"W-198.00' |
| ⑥ S50°19'08"E-112.62' | ⑭ N50°19'08"W-179.41' |
| ⑦ S39°40'52"W-83.00'  | ⑮ N39°40'52"E-200.00' |
| ⑧ Δ=4°42'58"          |                       |
| R=556.00'             |                       |
| L=45.77'              |                       |
| ⑨ N5°05'26"W-RADIAL   |                       |
| ⑩ N39°40'52"E-RADIAL  |                       |

### EASEMENT DATA

- ① 15.00' CITY OF SAN DIEGO STORM DRAIN ESMT. SDUPD DWG. NO. 519-025 EXIST.
- ② 15.00' CITY OF SAN DIEGO WATER ESMT. 519-D34 EXIST.
- ③ 20.00' CITY OF SAN DIEGO STORM DRAIN ESMT. SDUPD DWG. NO. 519-005 EXIST.
- ④ 25.00' PUBLIC PEDESTRIAN ACCESS ESMT.
- ⑤ 30.00' CITY OF SAN DIEGO WATER ESMT. S.D.U.P.D. DWG. NO. 519-031 EXIST.
- ⑥ 30.00' CITY OF SAN DIEGO STORM DRAIN ESMT. EXIST.
- ⑦ 60.00' CITY OF SAN DIEGO GEN. UTIL. ESMT. EXIST.
- ⑧ 24.00' PUBLIC PEDESTRIAN ACCESS ESMT.
- ⑨ 35.00' PUBLIC PEDESTRIAN ACCESS ESMT.
- ⑩ CITY OF SAN DIEGO GENERAL UTILITY EASEMENT 519-D30 EXIST.

DRAWN CSH  
 CHECKED  
 REVIEWED *GLN*  
 APPROVED

**SAN DIEGO UNIFIED PORT DISTRICT**  
 TIDELAND LEASE  
 WITHIN CORPORATE LIMITS OF SAN DIEGO  
**SAN DIEGO CONVENTION**  
**CENTER CORPORATION**

DATE 18 MAR 2010  
 SCALE  
 REF. 2E-19

DRAWING NO.  
 SHEET 4 OF 4  
 019-063

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EXHIBIT "B"

ESTOPPEL AFFIDAVIT

THIS ASSIGNMENT IS AN ABSOLUTE CONVEYANCE, ASSIGNOR HAVING TRANSFERRED SAID INTEREST TO ASSIGNEE FOR A FAIR AND ADEQUATE CONSIDERATION, SUCH CONSIDERATION, IN ADDITION TO ANY ABOVE BEING RECITED, BEING IN FULL SATISFACTION OF ALL OBLIGATIONS SECURED BY A DEED OF TRUST EXECUTED BY SAN DIEGO CONVENTION CENTER CORPORATION, INC., AS TRUSTOR, FOR THE BENEFIT OF FIFTH AVENUE LANDING, LLC, AS BENEFICIARY, RECORDED ON MAY 7, 2010 IN THE OFFICIAL RECORDS OF SAN DIEGO COUNTY, CALIFORNIA AS INSTRUMENT NO. 2010-0230907.

AFFIANT, AS ASSIGNOR, DECLARES THAT THIS CONVEYANCE IS FREELY AND FAIRLY MADE AND THAT THE ASSIGNMENT IS INTENDED TO BE AND IS AN ABSOLUTE CONVEYANCE OF THE TITLE OF THE PROPERTY DESCRIBED THEREIN TO THE ASSIGNEE NAMED THEREIN, AND WAS NOT AND IS NOT NOW INTENDED AS A MORTGAGE, TRUST CONVEYANCE, OR SECURITY OF ANY KIND. IT IS THE INTENTION OF AFFIANT, AS ASSIGNOR IN THE ASSIGNMENT, TO CONVEY, AND BY THE ASSIGNMENT AFFIANT DID CONVEY, TO THE ASSIGNEE NAMED THEREIN ALL ITS RIGHT, TITLE, AND INTEREST ABSOLUTELY IN AND TO THE PROPERTY DESCRIBED THEREIN AND THAT POSSESSION OF THE PROPERTY HAS BEEN SURRENDERED TO THE ASSIGNEE.

AFFIANT WILL TESTIFY, DECLARE, DEPOSE, OR CERTIFY BEFORE ANY COMPETENT TRIBUNAL, OFFICER, OR PERSON, IN ANY CASE NOW PENDING OR WHICH MAY HEREAFTER BE INSTITUTED, REGARDING THE PARTICULAR FACTS SET FORTH HEREIN.

Dated: 6/18/15

SAN DIEGO CONVENTION CENTER, INC.,  
A CALIFORNIA CORPORATION

By: [Signature]

Name: THOMAS MAZZOCCO

Title: EXECUTIVE MANAGER

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy or validity of that document.

STATE OF CALIFORNIA )

) ss.

COUNTY OF SAN DIEGO )

On June 18, 2015 before me, Patty F. Evans, Notary Public, personally appeared Thomas M. Mazzocco, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Patty F. Evans  
Notary Public

